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SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230 and 240

[Release No. 34-87115; File No. S7-14-19]

RIN: 3235–AM54

Publication or Submission of Quotations Without Specified Information

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule and concept release.

SUMMARY: The Securities and Exchange Commission (the "SEC" or the "Commission") is proposing amendments to 17 CFR 240.15c2-11 (the "Rule") under the Securities Exchange Act of 1934 (the "Exchange Act"). The Rule governs the publication of quotations for securities in a quotation medium other than a national securities exchange, i.e., over-the-counter ("OTC") securities. The Commission is proposing to provide greater transparency to investors and other market participants by requiring that information about the issuer and the security be current and publicly available; limit certain existing exceptions to the Rule, including the "piggyback exception," to provide greater protections to retail investors; reduce regulatory burdens on broker-dealers for the publication of quotations of certain OTC securities that may be less susceptible to potential fraud and manipulation, such as securities of certain issuers with higher capitalization and securities that were issued in underwritten offerings; and streamline the Rule, remove obsolete provisions without undermining the important investor protections of the Rule, and make technical, non-substantive changes. The Commission is also seeking comment about information repositories.

DATES: Comments should be received by December 30, 2019.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov.

Paper Comments:

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-14-19. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: John Guidroz, Branch Chief, Laura Gold, Special Counsel, Theresa Hajost, Special Counsel, Quinn Kane, Attorney-Advisor, Sam Litz, Attorney-Advisor, Aaron Washington, Special Counsel, Elizabeth Sandoe, Senior Special Counsel, Timothy M. Riley, Branch Chief, Josephine Tao, Assistant Director, Office of Trading Practices, and Mark Wolfe, Associate Director, Office of Derivatives Policy and Trading Practices, Division of Trading and Markets, Securities and Exchange Commission, 100 F St., NE, Washington, D.C. 20549, at (202) 551-5777.

SUPPLEMENTARY INFORMATION: The Commission is proposing for comment amendments to Rule 15c2-11 [17 CFR 240.15c2-11] under the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.]; and a conforming amendment to 17 CFR 230.144(c)(2) under the Securities Act of 1933 [15 U.S.C. 77a et seq.].

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I. Executive Summary

A. Introduction

Securities that trade on the OTC market are primarily owned by retail investors. Many issuers of quoted OTC securities publicly disclose current information about themselves. However, in other cases, there is no or limited current public information available about certain issuers of quoted OTC securities to allow investors or other market participants to make informed decisions regarding company fundamentals. The absence of current public information about such issuers can contribute to incidents of fraud and manipulation. The existing Rule is

designed to ensure that a broker-dealer reviews basic information about a security and issuer prior to publishing a quotation in the OTC market. In practice, however, the Rule's exceptions permit broker-dealers to publish quotations in perpetuity even when there is no or limited current information about the issuer available to the public or the broker-dealer, and even when the issuer no longer exists or has ceased operations. The proposed amendments are intended to modernize the Rule and in so doing better protect retail investors from incidents of fraud and manipulation in OTC securities, particularly securities of issuers for which there is no or limited publicly available information, and facilitate more efficient trading in certain more widely followed OTC securities.

1. Existing Rule

Adopted in 1971[1] and last substantively amended in 1991,[2] Rule 15c2-11 governs the publication and submission of quotations by a broker-dealer in a quotation medium for securities that are not listed on a national securities exchange.[3] In general terms, a quotation medium is an electronic communications network or other device used by broker-dealers to indicate interest to others in transacting in a security.[4]

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[1] See Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information, Exchange Act Release No. 9310 (Sept. 13, 1971), 36 FR 18641 (Sept. 18, 1971).

[2] See Initiation or Resumption of Quotations Without Specified Information, Exchange Act Release No. 29094 (Apr. 17, 1991), 56 FR 19148 (Apr. 25, 1991) ("1991 Adopting Release").

[3] A "national securities exchange" is a securities exchange that has registered with the SEC under Section 6 of the Exchange Act.

[4] A "quotation" is defined as any bid or offer at a specified price with respect to a security, or any indication of interest by a broker or dealer in receiving bids or offers from others for a security, or any indication by a broker or dealer that advertises its general interest in buying or selling a particular security. Exchange Act Rule 15c2-11(e)(3). A "quotation medium" is defined as "any publication or electronic communications network or other device that is used by broker-dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell." Exchange Act Rule 15c2-11(e)(1). The OTC market consists of quotation mediums and interdealer quotation systems ("IDQSs") where broker-dealers

Issuers of quoted OTC securities may range from large foreign issuers to small domestic companies, and some quoted OTC securities are thinly traded.[5] Information about these types of issuers is often limited, particularly when they are not subject to the Commission's periodic disclosure requirements.[6] A lack of current and publicly available information about an issuer can hinder an investor's ability to evaluate an issuer's security, thereby potentially preventing the investor from making an informed investment decision. In addition, an increased potential for fraud and manipulation exists when securities trade in the absence of information about the issuer.

Because broker-dealers play an integral role in facilitating investor access to OTC securities and serve an important gatekeeper function under Rule 15c2-11, it is important that a broker-dealer reviews key, basic information about an issuer before initiating a quoted market to solicit retail investors to purchase and sell a security in the OTC market. The existing Rule prohibits a broker-dealer from publishing any quotation for a security in a quotation medium

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(footnote continued)
actively publish quotations. An IDQS is a type of quotation medium and is defined as "any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers." Exchange Act Rule 15c2-11(e)(2). A quotation medium is an IDQS only if quotations in its system are attributed to a broker-dealer that is fully identified in such system.

[5] See generally Stock Screener, OTC Mkts. Grp. Inc., https://www.otcmarkets.com/research/stock-screener (last visited Aug. 5, 2019) ("OTC Markets Stock Screener") (providing market activity data for securities that are quoted on OTC Link ATS).

[6] An analysis of quoted OTC securities using Bloomberg's equity screening tool identified 2,007 securities for which quotations are published in an IDQS that have a three-month daily average dollar trading volume of less than $1,000. According to the OTC Markets Stock Screener, and based on the tier on which they are quoted in OTC Markets Group's system, such issuers do not provide current and publicly available information. See id. OTC Markets Group's "Pink: No Information" category contains "companies that are not able or willing to provide current disclosure to the public markets – either to a regulator, an exchange or OTC Markets Group. This category includes defunct companies that have ceased operations as well as 'dark' companies with questionable management and market disclosure practices." See generally Information for Pink Companies, OTC Mkts. Grp. Inc., https://www.otcmarkets.com/corporate-services/information-for-pink-companies (last visited July 12, 2019) (describing characteristics and requirements of each category of Pink companies).

without first reviewing certain information about the relevant issuer.[7] Under the existing Rule, a broker-dealer must have a reasonable basis for believing that the information about the issuer that it reviewed is accurate in all material respects and from a reliable source. The information review requirement is designed to help ensure that a quoted market for a security is less susceptible to fraudulent or manipulative schemes.[8]

While existing Rule 15c2-11 contains a requirement to review certain information, the Rule also provides exceptions from that requirement. Once a broker-dealer has published a quotation pursuant to the Rule, under specified exceptions to the Rule, other broker-dealers may publish quotations for that security (without being subject to the Rule's information review requirement). The Commission is concerned that market participants can take advantage of such exceptions from the information review requirement to the detriment of retail investors. For example, an active trading market, built upon broker-dealers' quotations, can give the market for the securities an appearance of credibility. Such a situation can facilitate the purchase or sale of securities even when there is no or limited current issuer information publicly available to investors. Without current public information about an issuer, it is difficult for an investor or other market participant to evaluate the issuer and the risks involved in purchasing or selling its securities.

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[7] Information about the issuer may include a prospectus; an offering circular; periodic reports; and various financial information regarding the issuer, such as the issuer's balance sheet, profit and loss statement, and retained earnings statement.

[8] See 1991 Adopting Release at 19152 n.43 ("Rule 15c2-11 was adopted under Section 15(c)(2) of the Exchange Act, 15 U.S.C. 78o(c)(2), among other sections. Section 15(c)(2) provides the Commission with broad authority to promulgate rules that prescribe means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices in the over-the-counter securities markets."). For purposes of this release the term "information review requirement" shall refer to the requirement for broker-dealers and other entities subject to the existing and proposed Rule to review certain issuer information, as described in the Rule, before publishing a quotation for a security, when no exception is available on which a broker-dealer may rely.

When there is little or no current information about an issuer available to investors, they can fall victim to fraudsters that make false and misleading statements about an issuer to promote sales of a security. Without current public information about an issuer, investors may not have the ability to assess the validity of the claims in a promotion campaign due to the lack of information against which to compare the claims. A fraudster's promotional campaign with false claims and published quotations may generate trading volume for a thinly-traded security and the security's market price may rise to an artificially high level ("pumping" the security). However, when the fraudster ceases its promotional campaign, the market price of the security may drop due to the fraudster selling its shares into the market it created by "pumping" the share prices up with false claims ("dumping" the security). The remaining investors may be left owning an essentially worthless security or one for which the price is artificially inflated.

2. Overview of Proposed Amendments

The proposed amendments to Rule 15c2-11 are a part of the Commission's ongoing effort to better address risks to retail investors and promote market efficiency. The proposed amendments seek to better protect retail investors from incidents of fraud and manipulation in OTC securities, by requiring that certain issuer information the broker-dealer is required to review be current and publicly available, while modernizing the Rule to be more efficient and effective.

First, the proposed amendments would provide greater transparency to the investing public regarding issuers of OTC securities by requiring that certain information about the issuer and the security be current and publicly available before a broker-dealer can publish a quote for the security. This proposed amendment would allow retail investors to more easily access basic information about an issuer. Additionally, the proposed amendments would require that

information be current and publicly available before a broker-dealer may rely on certain exceptions from the review requirement. In the absence of current and publicly available information, such exceptions would either be unavailable or more limited.

Second, the Commission is proposing to modify existing exceptions and, taking into consideration the evolution of the OTC market over the past 30 years, add several new exceptions. The Commission is proposing to limit eligibility for an existing exception, commonly known as the "piggyback exception," which allows broker-dealers to publish quotations for a security in reliance on the quotations of another broker-dealer that initially performed the review of the issuer's information. Under its existing formulation, this exception has been used by broker-dealers to continuously quote a security over many years, even when the issuer of the security no longer exists. The proposed amendments would limit the use of the exception in circumstances where issuer information is not current and publicly available.

The proposal would also limit the use of the existing unsolicited order exception for quotations on behalf of company insiders if information about the issuer is not current and publicly available.[9] This proposed revision is designed to help prevent the use of unsolicited orders by company insiders to facilitate a scheme that can harm retail investors, such as a "pump-and-dump" scheme.

The proposal would add an exception to allow broker-dealers to publish quotations of securities, without being required to conduct the information review required by the existing Rule, of certain issuers with significant assets and trading volume. The Commission believes that

[9] For purposes of this release, "company insider" refers to any officer or director of the issuer, or persons that perform a similar function, as well as any person who is, directly or indirectly, the beneficial owner of more than 10 percent of the outstanding units or shares of any class of any equity security of the issuer.

these types of issuers tend to be less susceptible to the type of fraud that the Rule is designed to prevent. The proposal would also add a new exception to reduce the burdens on broker-dealers that are quoting securities that were issued in an underwritten offering where the broker-dealer served as the underwriter. When a broker-dealer underwrites an offering of securities, it generally conducts a review of the same information that it must examine under the Rule. Thus, the Commission believes that continuing to require the broker-dealer to conduct a review under the Rule in this circumstance is redundant and unnecessary.

The Commission is also proposing new exceptions that would provide relief from the review requirement of the Rule, to permit a regulated entity, namely a qualified IDQS that meets the definition of an ATS, to conduct the information review that is currently only permitted to be conducted by broker-dealers that publish or submit quotations. A qualified IDQS or a national securities association also would be able to determine whether certain exceptions for broker-dealers are available. Finally, the proposed amendments would require that a broker-dealer, qualified IDQS, or registered national securities association keep records regarding the basis of its reliance on, or determination of availability of, any exception to the Rule to aid in Commission oversight of compliance with the Rule.

Finally, the Commission is proposing amendments to streamline the existing Rule, remove obsolete provisions without undermining the important investor protections of the Rule, and make technical, non-substantive changes. With respect to streamlining, the proposal would permit a broker-dealer to provide to an investor that requests issuer information appropriate instructions regarding how to obtain such information electronically. Finally, the Commission is proposing to remove paragraphs that have become obsolete. The proposal would remove an exception for quotations of Nasdaq securities because Nasdaq is now registered with the Commission as a

national securities exchange. The Commission also proposes to remove a requirement that a broker-dealer send information to certain systems that disseminate quotation information because the Commission understands that such entities no longer rely on the broker-dealer sending such information. Further, the proposal would remove a requirement that a broker-dealer make an arrangement to receive certain issuer information that is now available on the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR").

3. Intended Objectives

The proposed amendments are intended to promote investor protection, preserve the integrity of the OTC market, and promote capital formation for issuers that provide current and publicly available information to their investors. First, the proposed amendments are designed to provide the following benefits to investors, particularly retail investors. The proposed amendments would promote the public availability of current information about issuers with securities that are quoted in the OTC market. This should facilitate an investor's access to information about an issuer so that an investor is better able to understand and evaluate the issuer and the issuer's security prior to making an investment decision. The proposed amendments should also help promote a more level playing field so that all investors, not just company insiders and investors with a relationship with the issuer, have access to current issuer information. Further, the proposed amendments are intended to reduce the occurrence of investors making investment decisions based on false or misleading statements spread by fraudsters.

Second, the proposed amendments are intended to preserve the integrity of the OTC market. The proposed amendments would prohibit broker-dealers from continuing to quote a security in the absence of current and publicly available information about the issuer, which

could reduce the risk of fraud and manipulation in this market. In addition, current and publicly available information about issuers would help to improve pricing efficiency in the OTC market.

Third, the proposed amendments are designed to promote capital formation for issuers that provide current and publicly available information to their investors. A hallmark of public markets in the United States is disclosure provided by issuers to investors. Investors that have access to current and publicly available issuer information are better equipped to make informed decisions about how to allocate their capital. Additionally, the proposed amendments broaden the type of entities that are permitted to conduct the information review required by the Rule while imposing requirements on those entities to help promote the accuracy of such information as well as help ensure that it is current. This may make it easier for issuers to identify a market participant that is willing and able to conduct the review in order to establish a quoted market for the issuer's securities. Further, as discussed above, the proposal would add certain specified exceptions from the requirement to conduct the information review under the proposed Rule and allow broker-dealers to start a quoted market for the securities of certain issuers where there is less concern regarding fraud or manipulation, which could reduce costs for broker-dealers seeking to establish a quoted market. These new exceptions would provide investors with more choices in the OTC market.

B. Summary of Proposed Amendments

The Commission proposes to strengthen the existing Rule as follows:

- Require the documents and information that a broker-dealer must obtain and review under the Rule to be current and publicly available;[10]

[10] Currently, this information is required by existing paragraph (a), but the existing Rule does not require this information to be made publicly available. Under this proposal, the required information would be included in proposed paragraph (b) and would be known as "proposed paragraph (b) information." Throughout this release, when the Commission references text from existing provisions of Rule 15c2-11, the Commission will use the terms

- Amend the "piggyback exception," which is conditioned on continuous and frequent quotations, to:
    - Require issuer information to be current and publicly available;
    - Eliminate the ability of a broker-dealer to rely on the exception unless there are two-sided quotations that are published in an interdealer quotation system at specified prices;
    - Eliminate the ability of broker-dealers to rely on the exception during the first 60 calendar days after the termination of a Commission trading suspension under Section 12(k) of the Exchange Act;
    - Eliminate the ability of broker-dealers to rely on the exception for securities of "shell companies;"[11] and
    - Remove the requirement that a security be quoted for 12 business days during the previous 30 calendar days;
- Require that certain issuer information be current and publicly available for a broker-dealer to rely on the unsolicited quotation exception to publish quotations by or on behalf of company insiders; and
- Require documentation to support a broker-dealer's reliance on exceptions to the Rule.

The Commission also is proposing to reduce burdens on broker-dealers publishing quotations of securities of OTC issuers by providing new exceptions for broker-dealers to:

- Publish quotations for securities of well-capitalized issuers with actively traded securities;

(footnote continued)
"paragraph," "Rule," "existing paragraph," or "existing Rule." When the Commission references rule text that the Commission is proposing to adopt, the Commission will use the terms "proposed Rule" or "proposed paragraph."

[11] When used in this Release, the term "shell company" means an issuer, other than a business combination related shell company, as defined in Rule 405 of Regulation C, or an asset-backed issuer as defined in Item 1101(b) of Regulation AB, that has (1) no or nominal operations and (2) either (i) no or nominal assets, (ii) assets consisting solely of cash and cash equivalents, or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets. The Commission is proposing to add this definition of shell company in proposed paragraph (e)(8). See Proposed Rule 15c2-11(e)(8).

- Publish quotations for securities where a qualified interdealer quotation system ("qualified IDQS"), conducts the proposed Rule's required review and makes known to others the quotation of a broker-dealer relying on the exception;[12]

- Rely on publicly available determinations by a qualified IDQS or a registered national securities association that the requirements of certain exceptions have been met; and

- Publish quotations for a security without complying with the information review requirement if that broker-dealer was named as an underwriter in the security's registration statement or offering circular.

The Commission is proposing amendments to streamline certain requirements of the existing Rule that would:

- Modify the requirement that a broker-dealer make the information that it obtained and reviewed "reasonably available upon request" to investors seeking such information to permit the broker-dealer to direct the investors to the publicly-available information upon which the broker-dealer relied to comply with the information review requirement;

- Remove the Nasdaq security exception in light of Nasdaq's registration as a national securities exchange;

- Provide new definitions and make other technical, non-substantive changes to the Rule; and

- Remove the paragraphs regarding furnishing information to an IDQS and how a broker-dealer obtains annual, quarterly, and current reports filed by an issuer with the Commission.

Finally, the Commission is seeking comment about information repositories and a possible regulatory structure for such entities.

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[12] The Commission is proposing to define a qualified IDQS as any interdealer quotation system that meets the definition of an alternative trading system under Rule 300(a) of Regulation ATS and operates pursuant to the exemption from the definition of an "exchange" under Rule 3a1-1(a)(2) of the Exchange Act. See Proposed Rule 15c2-11(e)(5). The Commission believes that the requirements of Regulation ATS, as applicable to qualified IDQSs, would provide investor protections through, for example, Commission oversight. See infra Part III.H.4.

II. Background

A. Regulatory Approaches to Combating Retail Investor Fraud

A core mission of the Commission is protecting investors. This proposal continues the Commission's focus on protecting retail investors from fraud and manipulation.[13] Over the past several years, the Commission has brought hundreds of enforcement actions involving OTC securities or their issuers, including for alleged violations of the antifraud, reporting, and registration provisions of the federal securities laws. Many of these cases have involved dozens of OTC securities and tens of millions of dollars in investor harm.

In addition to enhancing efforts to detect and address fraudulent conduct that has already occurred, such as through the Commission's examination and enforcement programs, the Commission has also been proactive in taking measures that are designed to prevent fraudulent activity before it occurs. Specifically, the Commission has developed initiatives that focus on investor education and research tools that can help investors to make better-informed investment decisions and avoid investing in fraudulent schemes.

For example, the Commission launched the "SEC Action Lookup for Individuals" ("SALI"), an online search feature that enables retail investors to research whether persons trying to sell them investments have a judgment or order entered against them in an enforcement action.[14] SALI is intended to help retail investors avoid financial fraud. The Commission also participates in a joint agency task force, spearheaded by the Department of Justice, on market

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[13] See Speech, Chairman Jay Clayton, Remarks on the Establishment of the Task Force on Market Integrity and Consumer Fraud (July 11, 2018), https://www.sec.gov/news/speech/task-force-market-integrity-and-consumer-fraud ("Serving and protecting Main Street investors is my main priority at the SEC.").

[14] See Press Release, SEC Launches Additional Investor Protection Search Tool (May 2, 2018), https://www.sec.gov/news/press-release/2018-78.

integrity and consumer fraud,[15] and the Commission's Division of Enforcement formed the Retail Strategy Task Force as well. The Retail Strategy Task Force draws on expertise throughout the Commission to develop strategies and techniques for addressing the types of activities that harm retail investors, including microcap pump-and-dump schemes.[16]

Last year, the Commission's Division of Trading and Markets hosted a roundtable on "Regulatory Approaches to Combating Retail Fraud" (the "Roundtable").[17] The Roundtable featured panel discussions about schemes that target retail investors and possible approaches to combat retail investor fraud.[18] The effectiveness of Rule 15c2-11 was a topic of discussion at one panel where panelists stated that the current operation of the Rule in certain circumstances may result in retail investors having little or no information about a company.[19] This lack of current and publicly available information about a company particularly disadvantages retail investors in comparison to other market participants.[20]

Indeed, as the Chairman has stated, the lack of publicly available information about

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[15] See, e.g., Public Statement, Chairman Jay Clayton, Opening Remarks at the SEC Staff Roundtable on Regulatory Approaches to Combating Retail Investor Fraud (Sept. 26, 2018), https://www.sec.gov/news/public-statement/clayton-opening-remarks-investor-fraud-roundtable.

[16] See Press Release, SEC Launches Enforcement Initiative to Combat Cyber-Based Threats and Protect Retail Investors (Sept. 25, 2017), https://www.sec.gov/news/press-release/2017-176.

[17] See, e.g., Press Release, SEC Staff to Host Roundtable on Regulatory Approaches to Combating Retail Investor Fraud (Sept. 18, 2018), https://www.sec.gov/news/press-release/2018-200.

[18] See, e.g., Transcript of Roundtable on Regulatory Approaches to Combatting Retail Fraud (Sept. 26, 2018), https://www.sec.gov/spotlight/equity-market-structure-roundtables/retail-fraud-round-roundtable-092618-transcript.pdf ("Roundtable Transcript").

[19] See id; see also Speech, Chairman Jay Clayton & Dir. Brett Redfearn, Equity Market Structure 2019: Looking Back & Moving Forward, Remarks at Gabelli School of Business, Fordham University, n.16 (Mar. 8, 2019) ("Equity Market Structure Speech") https://www.sec.gov/news/speech/clayton-redfearn-equity-market-structure-2019.

[20] See Equity Market Structure Speech, supra note 19.

certain issuers "can be fertile ground for fraud."[21] Studies have noted instances of fraud and manipulation in cases involving OTC securities.[22] A majority of the enforcement cases involving OTC securities has involved delinquent filings, which result in a lack of current, accurate, or adequate information about an issuer.[23] In fact, during the last four years, the SEC has issued orders suspending or revoking the registrations of over 1,100 issuers pursuant to its authority under Section 12(j) of the Exchange Act for issuers with delinquent filings.[24] The Commission has temporarily suspended trading in the securities of over 900 issuers under Section 12(k) of the Exchange Act because of potentially manipulative or deceptive activity or questions about the accuracy and adequacy of publicly disseminated information.[25]

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[21] Id.

[22] For example, one study analyzed 142 stock manipulation cases, including pump-and-dump cases, in SEC litigation releases from 1990 to 2001 and found that 48 percent involved OTC securities, while 17 percent involved securities listed on national exchanges. See Rajesh Aggarwal & Guojun Wu, Stock market manipulations, 79 J. Bus. 1915 (2006). A more recent study looked at 150 pump-and-dump manipulation cases between 2002 and 2015 and found that 86 percent of these cases involved OTC securities. See Thomas Renault, Market manipulation and suspicious stock recommendations on social media, Université Paris I Panthéon-Sorbonne—Centre d'Economie de la Sorbonne, Working Paper (2018), available at https://ssrn.com/abstract=3010850.

[23] For instance, one study looked at a broad sample of securities cases between January 2005 and June 2011 and identified 1,880 cases involving OTC securities and 1,157 cases involving securities listed on exchanges in the United States. Of the OTC securities cases, the majority—1,148 cases, or 61 percent—were related to delinquent filings, 151 (eight percent) were related to a pump-and-dump scheme, 159 (eight percent) were related to financial fraud, 12 (one percent) were related to insider trading, and 212 (11 percent) were related to other fraudulent misrepresentation or disclosure. See Douglas J. Cumming & Sofia Johan, Listing standards and fraud, 34 Managerial & Decision Econ. 451–70 (2013).

[24] Administrative Proceedings (2019), https://www.sec.gov/litigation/admin.shtml; Annual Report, SEC, Div. Enforcement, 20 (2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf; Addendum to Annual Report, SEC, Div. Enforcement, 3 (2017), https://www.sec.gov/files/enforcement-annual-report-2017-addendum-061918.pdf; Select SEC and Market Data Fiscal 2016, 3 (2016), https://www.sec.gov/files/2017-03/secstats2016.pdf.

[25] See Trading Suspensions (2019), https://www.sec.gov/litigation/suspensions.shtml; Annual Report, SEC, Div. Enforcement, 5 (2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf; Addendum to Annual Report, SEC, Div. Enforcement, 2 (2017), https://www.sec.gov/files/enforcement-annual-report-2017-addendum-061918.pdf; Select SEC and Market Data Fiscal 2016, 2 (2016), https://www.sec.gov/files/2017-03/secstats2016.pdf.

B. OTC Market Developments

The OTC market provides numerous benefits for investors. For instance, some highly capitalized foreign securities are quoted on this market. Other foreign companies are also quoted on this market in the form of American Depository Receipts, providing investors with easy access to such foreign securities. The OTC market also can provide opportunities for retail investors to find securities of domestic issuers with future growth potential. Additionally, some larger U.S. companies may trade on the OTC market for various reasons.[26] Further, this market can offer a starting point for smaller issuers, as it may be difficult for a company just starting out to meet exchange listing requirements or pay listing fees. However, because stocks quoted on this market can be less liquid, have lower capitalization, and provide less transparency than exchange-listed securities, it can be easier for unscrupulous persons to find ways to abuse such securities.

When a broker-dealer publishes or submits a quotation for a security in a quotation medium, the broker-dealer may facilitate the creation or appearance of a market for the security, thereby increasing the security's availability and accessibility to investors. A broker-dealer's quotations could create the false appearance of an active market, including affecting the pricing, rather than an actual market that is based on independent forces of supply and demand. Thus, to help prevent fraud and manipulation,[27] existing Rule 15c2-11 prohibits broker-dealers from

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[26] See, e.g., Peter Leeds, Famous Companies Traded as Penny Stocks, The Balance (June 25, 2019), https://www.thebalance.com/famous-companies-traded-as-penny-stocks-2637058.

[27] See Initiation or Resumption of Quotations Without Specified Information, Exchange Act Release No. 21470 (Nov. 8, 1984), 49 FR 45117 (Nov. 15, 1984) ("1984 Adopting Release"); see also Publication or Submission of Quotations Without Specified Information, Exchange Act Release No. 41110 (Feb. 25, 1999), 64 FR 11126 (Mar. 8, 1999) ("1999 Reproposing Release") ("Rule 15c2-11 is intended to prevent broker-dealers from becoming involved in the fraudulent manipulation of OTC securities. However, even if a broker-dealer technically complies

publishing or submitting quotations in OTC securities in the absence of accurate information about the issuers of such securities, unless an exception applies.[28]

Under existing Rule 15c2-11, a broker-dealer seeking to publish or submit a quotation in any quotation medium, including in an IDQS, must comply with the existing Rule's information review requirement for each quotation, unless it qualifies for an exception. Thus, generally, a broker-dealer must obtain and review information about the issuer enumerated in paragraph (a) of the existing Rule, such as basic financial information, and maintain records of the information that it reviewed. Certain exceptions to the Rule permit broker-dealers to publish or submit quotations without complying with the information review requirement. For instance, once a security has become eligible for the piggyback exception, any broker-dealer can quote the security without complying with the information review requirement so long as the requirements of the exception are met.[29]

The OTC market has changed significantly since the Rule was adopted in 1971 and was last substantively amended in 1991. For example, the existing Rule was last substantively amended prior to the widespread use of the Internet, when it was significantly more difficult to obtain information on issuers of OTC securities and to continuously update and widely disseminate quotations for OTC securities. The Internet and other forms of electronic

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(footnote continued)
with the Rule's requirements, it could be subject to liability under other antifraud provisions of the securities laws, such as Rule 10b-5, if it publishes quotations as part of a fraudulent or manipulative scheme.").

[28] See 1991 Adopting Release at 19149–52.

[29] The piggyback exception presumes that regular and frequent quotations for a security generally (1) reflect market supply and demand and the available information about the security and its issuer and (2) are based on independent, informed pricing decisions. See 1984 Adopting Release at 45121; see also 1999 Reproposing Release at 11126.

communication have made it less costly and less burdensome to access, update, and disseminate information on a global scale. Marketplaces have developed platforms that collect and provide information to the public through easily accessible websites, including information regarding the risks involving certain quoted OTC securities.[30] In light of these developments, the Commission preliminarily believes that it is appropriate to update and modernize the Rule.

C. Prior Rule 15c2-11 Proposals

The Commission proposed to amend Rule 15c2-11 in February 1998[31] and re-proposed amendments to the Rule in February 1999.[32] Among other things, both the 1998 Proposing Release and the 1999 Reproposing Release would have eliminated the existing Rule's piggyback exception and required broker-dealers to publish priced quotations as well as obtain updated information about the issuer annually.[33]

Commenters on the 1999 Reproposing Release stated that the adoption of the proposed amendments, including elimination of the piggyback exception, would severely constrain liquidity in the OTC market resulting in less competitive pricing, impair access to capital by issuers, and increase compliance costs for broker-dealers. Commenters, however, were generally supportive

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30 At least one IDQS, OTC Markets Group, has voluntarily implemented measures to warn investors about the risks involving certain securities by using easy to identify symbols, such as stop signs and skull and crossbones, to indicate that specific securities present risks or there is a lack of information about them. See Compliance Flags, OTC Mkts. Grp. Inc., https://www.otcmarkets.com/files/OTCM%20Compliance%20Flags.pdf (last visited Sept. 23, 2019) (describing designators and flags "to help identify opportunity and quantify risk").

31 Publication or Submission of Quotations Without Specified Information, Exchange Act Release No. 39670 (Feb. 17, 1998), 63 FR 9661 (Feb. 25, 1998) ("1998 Proposing Release").

32 1999 Reproposing Release at 11124.

33 The 1999 Reproposing Release also included an Appendix. The Appendix was intended to supplement the guidance from the 1991 Adopting Release (which was incorporated into the Rule through the Preliminary Note) by providing additional guidance on, among other things, "red flags" concerning the issuer that broker-dealers should consider as part of the information review requirement. See id., 1999 Reproposing Release at 11145.

of certain proposed new exceptions in the 1999 Reproposing Release. Specifically, commenters were in favor of proposed new exceptions to exclude larger issuers and more liquid securities that are not prone to the abuses that are more likely in the microcap market. The Commission did not take further action on the proposals.

III. Discussion of Proposed Amendments

A. Proposed Amendments to the Information Review Requirement

1. Existing Information Review Requirement

The existing Rule requires that a broker-dealer review certain information about the issuer of an OTC security prior to publishing a quotation for such security. The Rule requires that the broker-dealer form a reasonable basis for believing that such information about the issuer is accurate in all material respects and from a reliable source.

Currently, Rule 15c2-11(a) requires that, prior to initially publishing or submitting quotations for a security in a quotation medium when no exception to the information review requirement is available (the "initial publication or submission"), a broker-dealer must have in its records the information and documentation specified in Rule 15c2-11(a)(1)–(5) (the "paragraph (a) information").[34] In addition, the broker-dealer must have a reasonable basis under the circumstances, based on a review of paragraph (a) information and any other supplemental information required by Rule 15c2-11(b) (the "paragraph (b) information"), to believe that the information is accurate in all material respects and from a reliable source.[35]

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[34] Exchange Act Rule 15c2-11(a).

[35] Id. To simplify the structure of the existing Rule, the Commission proposes to separate the activities constituting the review requirement from the specific list of information to be reviewed.

The existing Rule requires particular information depending on the regulatory status of the issuer—i.e., whether the issuer (1) filed a registration statement under the Securities Act of 1933 ("Securities Act") (a "prospectus issuer"), (2) filed a notification under Regulation A[36] (a "Reg. A issuer"), (3) is subject to the Exchange Act's or Regulation A's periodic reporting requirements or is the issuer of a security covered by Section 12(g)(2)(B) or (G) of the Exchange Act (a "reporting issuer"), (4) is a foreign private issuer that is exempt from registration under Exchange Act Section 12(g) pursuant to Rule 12g3-2(b) (an "exempt foreign private issuer"), or (5) is an issuer that does not fall within one of these categories (a "catch-all issuer").[37] Depending on the circumstances, statutes or Commission rules also require the paragraph (a) information for prospectus issuers, Reg. A issuers, and reporting issuers to be made publicly available, either by prospectus, offering circular, or periodic reports.[38] Similarly, exempt foreign private issuers are required, among other things, to publish certain information in order to be exempt from the requirement to register a class of equity securities under Section 12(g) of the Exchange Act. In contrast, the information that is required under paragraph (a)(5) of the existing

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[36] See Rules 251 through 263 of Regulation A.

[37] See Exchange Act Rule 15c2-11(a)(1) (an issuer that has filed an effective registration statement under the Securities Act), (a)(2) (an issuer that has filed a notification under Regulation A and was authorized to commence an offering), (a)(3) (an issuer that is required to file reports pursuant to Section 13 or 15(d) of the Exchange Act or pursuant to Regulation A, or an issuer of a security covered by Section 12(g)(2)(B) or (G) of the Exchange Act), (a)(4) (a foreign private issuer that is exempt from registering a class of equity securities under Section 12(g) of the Exchange Act pursuant to Rule 12g3-2(b) thereunder), (a)(5) (an issuer that does not fall within any paragraphs (a)(1) through (a)(4)). For example, the Rule sets out the specific information requirements for Reg. A issuers, but these information requirements are specific to Rule 15c2-11 and do not supplant the requirements in Rule 144(c) for adequate current public information. See, e.g., Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Securities Act Release No. 9741 (Mar. 25, 2015), 80 FR 21806, 28151 (Apr. 20, 2015).

[38] See, e.g., Securities Act Section 7 (information required in registration statement); Securities Act Section 10 (information required in prospectus); Exchange Act Section 12(b) (information required to register a security on a national securities exchange); Exchange Act Section 13 (periodic and other reports); Securities Act Rule 257 of Regulation A (periodic and current reporting); Exchange Act Rule 13a-1 (annual reports); Exchange Act Rule 13a-13 (quarterly reports).

Rule for catch-all issuers generally is not subject to similar statutory or rule-based disclosure and reporting requirements.

Under the existing Rule, catch-all issuer information that a broker-dealer obtains and reviews for the information review requirement is not required to be publicly available. Instead, Rule 15c2-11(a)(5) requires a broker-dealer that publishes or submits quotations for a security of a catch-all issuer when no exception is available to make such information reasonably available upon request to a person expressing an interest in a proposed transaction in the security with that broker-dealer.[39] The Commission believes that enhancing the Rule's investor protections to require basic issuer information to be publicly available[40] in order for a broker-dealer to publish or submit a quotation when no exception to the information review requirement is available for an OTC security and to publish quotations throughout the life of the quoted market for the security could help investors to make better-informed investment decisions.[41]

2. Proposed Amendments to the Information Review Requirement

a) Revisions to the Review Requirement

The Commission is proposing changes to the existing Rule's information review requirement, which requires broker-dealers to review certain information prior to publishing a quotation in an OTC security.[42] Specifically, the proposed Rule would (1) restructure the review

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39 Exchange Act Rule 15c2-11(a)(5).

40 See Proposed Rule 15c2-11(e)(4). Publicly available would be defined to mean available on EDGAR or on the website of a qualified IDQS, a registered national securities association, the issuer, or a registered broker-dealer, so long as access is not restricted by user name, password, fees, or other restraints. As discussed below, this requirement also would apply to a qualified IDQS under proposed paragraph (a)(2).

41 See, e.g., Joshua T. White, Outcomes of Investing in OTC Stocks, 10 (Dec. 16, 2016), https://www.sec.gov/files/White_OutcomesOTCinvesting.pdf ("Academic studies point to a lack of information produced by OTC Companies as one determinant of negative and volatile OTC stock returns.").

42 See infra Part V.

requirement into paragraphs and re-letter such paragraphs accordingly, (2) require that certain issuer information be current and publicly available, and (3) permit additional market participants to perform the required review. Combined, these proposed amendments are intended to, among other things, promote better-informed investment decisions by increasing investors' opportunity for access to current information, and facilitate capital formation by allowing more market participants to perform the required review with respect to the proposed Rule so that quotations can be initiated and investors can buy and sell OTC securities.

The Commission is proposing to restructure the review requirement and include the requirement as applicable to broker-dealers in proposed paragraph (a)(1).[43] The Commission is proposing to separate each element of existing paragraph (a) into separate paragraphs and re-letter the paragraphs accordingly. Proposed paragraph (a)(1)(i) would contain the existing requirement that a broker-dealer have in its records the documents and information required by the Rule. Proposed paragraph (a)(1)(iii) would contain the existing requirement that the broker-dealer, based upon a review of certain required information,[44] together with any other required documents and any supplemental information,[45] have a reasonable basis under the circumstances

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[43] The term "review requirement" refers to the requirements under proposed paragraph (a).

[44] Note that, generally, the existing Rule's provisions would be re-lettered to conform with these changes, so that required information in existing paragraph (a) would be re-lettered to proposed paragraph (b). Proposed paragraph (b) information would include the information required to be reviewed by the regulated entity, such as a prospectus, an offering circular, periodic reports, or information specified in paragraph (b), to quote a security of different types of issuers, i.e., prospectus issuers, Reg. A issuers, reporting issuers, exempt foreign private issuers, and catch-all issuers.

[45] Existing paragraph (b), which would be re-lettered to proposed paragraph (c), would include supplemental information (including information about the person on whose behalf the quotation is being submitted, trading suspensions within the prior 12 months, any other material information) that would also be required to be reviewed by a regulated entity.

for believing that the information required to be reviewed is accurate in all material respects and from a reliable source.

As discussed below, the Commission is proposing a new paragraph (a)(1)(ii) to add a new requirement that the issuer information required to be reviewed (except for information required by proposed paragraphs (b)(5)(i)(N) through (P)) must be current and publicly available.[46]

The proposed Rule would not require a qualified IDQS to comply with the information review requirement as a condition to the qualified IDQS's making known to others the quotation of a broker or dealer that is published or submitted, unless it is published or submitted by a broker-dealer relying on paragraph (f)(7). The proposed Rule would permit a qualified IDQS to make known to others the publication or submission of quotations of a broker-dealer that relies on a qualified IDQS's compliance with the information review requirement pursuant to proposed paragraph (f)(7). The qualified IDQS requirements under proposed paragraph (a)(2) would mirror the requirements for broker-dealers under proposed paragraph (a)(1). The Commission is proposing to add this provision for qualified IDQSs because the Commission is proposing to except broker-dealers from the information review requirement where (1) a qualified IDQS complies with the information review requirement and (2) the broker-dealer relies on the qualified IDQS's review to publish or submit a quotation for that security.[47] Accordingly, the qualified IDQS would be required to have in its records proposed paragraph (b) information, excluding proposed paragraphs (b)(5)(i)(N) through (P) as explained below, except where the

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46 See Proposed Rule 15c2-11(a)(1)(ii).

47 See Proposed Rule 15c2-11(f)(7).

qualified IDQS has knowledge or possession of information set forth in proposed paragraphs (b)(5)(i)(N) through (P).[48] In addition, the proposed amendments would require that proposed paragraph (b) information, excluding proposed paragraphs (b)(5)(i)(N) through (P), be current and publicly available.

b) Require Current and Publicly Available Issuer Information

The proposed Rule would require that issuer information relied upon by a broker-dealer be current and publicly available in order for a broker-dealer to publish or submit a quotation for that security. The proposed amendments to the Rule would provide an additional mechanism through which investors could have access to information about issuers with securities that are quoted by broker-dealers in the OTC market. Current and publicly available information could enable retail investors to make better-informed investment decisions and counteract misinformation. By requiring that certain issuer information be current and publicly available before a broker-dealer publishes or submits quotations in the OTC market without an exception, the proposed amendments could facilitate investors' research of issuers and their securities and help investors to be able to make better-informed investment decisions. The public availability of issuer information required under proposed paragraph (b) would help to alleviate concerns

[48] See Proposed Rule 15c2-11(a)(2). Proposed paragraphs (b)(5)(i)(N) through (P) would include information about whether the broker-dealer or its associated person is affiliated with the issuer; whether the quotation is being published or submitted on behalf of any other broker-dealer (if so, the name of such broker-dealer); and whether the quotation is being submitted or published (directly or indirectly) by or on behalf of the issuer or certain persons associated with the issuer and, if so, the name of such person, and the basis for any exemption. A qualified IDQS might not have knowledge or possession of information set forth in proposed paragraphs (b)(5)(i)(N) through (P) because this information pertains to individual quotations and broker-dealers and is not issuer-specific. A qualified IDQS would only be required to have proposed paragraph (b)(5)(i)(N) through (P) information that has come to its knowledge or that is in its possession.

that limited or no information for certain issuers of quoted OTC securities exists or that such information is difficult for retail investors to find.[49]

Proposed paragraphs (a)(1)(ii) and (a)(2)(ii) would require that proposed paragraph (b) information be current and publicly available for all issuers, without regard to the regulatory category they fall into, prior to a broker-dealer providing the initial publication or submission of a quotation for an issuer's OTC security. The Commission is proposing to exclude from that requirement information identified in proposed paragraphs (b)(5)(i)(N) through (P) because those paragraphs refer to information about the quotations and the entities providing them, not issuer-specific information.[50]

The Commission is proposing to define the term "publicly available" to mean available on EDGAR or on the website of a qualified IDQS, a registered national securities association, the issuer, or a registered broker-dealer.[51] If such proposed paragraph (b) information is restricted by user name, password, fees, or other restraints, it would not be publicly available. The Commission is also proposing to define "current" to mean filed, published, or disclosed in accordance with the time frames identified in each paragraph (b)(1) through (b)(5).[52]

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[49] See, e.g., Ulf Bruggemann et al., The Twilight Zone: OTC Regulatory Regimes and Market Quality, 31 Rev. Fin. Stud. 898, 907 (2018) (noting difficulties in accessing information about companies, even information filed with state regulators); Jeff Swartz, The Twilight of Equity Liquidity, 34 Cardozo L. Rev. 531, 573 (2012) (stating that this situation is particularly problematic because unsophisticated investors make up a large portion of OTC market participants); see also Roundtable Transcript, supra note 18, at 85, 192–93; Michael K. Molitor, Will More Sunlight Fade the Pink Sheets? Increasing Public Information About Non-Reporting Issuers with Quoted Securities, 39 Ind. L. Rev. 309, 311, 337 (2006).

[50] See Proposed Rule 15c2-11(b)(5)(i)(N) through (P).

[51] See Proposed Rule 15c2-11(e)(4).

[52] See Proposed Rule 15c2-11(e)(1).

The Commission believes that many issuers already make publicly available proposed paragraph (b) information that is current because these issuers have a reporting obligation or voluntarily do so.[53] The Commission believes the proposal provides incentives for issuers of quoted OTC securities that do not currently make proposed paragraph (b) information publicly available or do not keep such information current to make such information publicly available and keep it current. Under the proposal, before a broker-dealer can initiate the publication or submission of a quotation for an issuer's securities in the OTC market, or rely on an exception to the information review requirement, proposed paragraph (b) information must be current and publicly available. The proposed amendments to the Rule would not preclude others, such as broker-dealers or investors, from making proposed paragraph (b) information publicly available, particularly when the information comes directly from the issuer.[54]

The Commission believes that requiring proposed paragraph (b) information to be current and publicly available in order for a broker-dealer to initiate and maintain a quoted market for OTC securities would impose costs but provide significant benefits to investors. In particular, retail investors, who might not have the same level of access to information available to other market participants, such as those that may have a relationship with the issuer, would benefit from having access to proposed paragraph (b) information that is current. The proposed amendments would also help prevent the potential use of a catch-all issuer as a vehicle to defraud

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[53] The Commission believes that there are some issuers that voluntarily make publicly available proposed paragraph (b) information through OTC Markets Group's Alternative Reporting Standard. See infra Part VIII.

[54] To the extent an issuer, underwriter, or dealer is providing consideration to a person to publish proposed paragraph (b) information, such person may have additional disclosure obligations under Section 17(b) of the Securities Act.

investors by, for example, changing its business or ownership and ceasing to provide public information after a market has developed for its securities.

Q1. Should the proposed Rule allow other entities besides a broker-dealer or qualified IDQS to comply with the information review requirement? Why, or why not? If a commenter believes an entity should be added, what entity should be added, and why?

Q2. Should proposed paragraph (b) information meet the definition of "publicly available" if, for example, access to such information requires payment of a fee or registration and provision of customer data to be allowed access to such information? Are there any other potential barriers to accessibility that the Commission should address? If so, what are they and how should the Commission address them in this rulemaking?

c) Reorganize the Reporting Issuer Information

The proposed Rule would simplify the organization of information regarding reporting issuers by addressing each type of issuer in a separate paragraph in order to improve readability. The Commission is proposing to reorganize how the information for reporting issuers is arranged in paragraph (a)(3) of the existing Rule to group the required information that a broker-dealer must obtain and review into paragraphs by the type of issuer. Additionally, the Commission is proposing to apply paragraph (a)(3), which would be re-lettered to proposed paragraph (b)(3), to qualified IDQSs that make known to others the quotation of a broker-dealer pursuant to proposed paragraph (a)(2), so that the requirements (1) regarding when to obtain reports, and (2) to have a reasonable basis under the circumstances for believing that the issuer is current in filing reports, would apply to the qualified IDQS.

The proposed change to the Rule is not intended to change any substantive obligations for a broker-dealer under the existing Rule. The reorganization would remove references to Section

12(g)(2)(B), which exempts from registration under Section 12 of the Exchange Act securities issued by investment companies registered pursuant to Section 8 of the Investment Company Act of 1940. Under the existing Rule, to the extent that an issuer covered by 12(g)(2)(B) has a reporting obligation under the Exchange Act, a broker-dealer would be required to comply with the information review requirement and conduct a review of such issuer's annual, quarterly, and current reports. Given proposed paragraph (b)(3)(i), which would apply to issuers with a reporting obligation under Section 13 or 15(d) under the Exchange Act, the removal of the reference to Section 12(g)(2)(B) would not be a substantive change.

d) Current Reports

The Commission is proposing to incorporate into proposed paragraphs (b)(3)(i) through (iii), with some modification, paragraph (d)(2)(i) of the existing Rule, which provides a timing requirement for a broker-dealer to obtain current reports, such as Forms 8-K. The events triggering an issuer's filing of current reports with the Commission generally are material events affecting the issuer, such as a change in control, acquisition or disposition of assets, bankruptcy or receivership, change in accountants, or resignation of a director.[55] The existing Rule requires that a broker-dealer obtain all current reports filed with the Commission by the issuer from the earlier of five business days before the initial publication or submission of a quotation or the date of submission of paragraph (a) information pursuant to applicable rules of the Financial Industry

[55] 1991 Adopting Release at 19154.

Regulatory Authority ("FINRA") or its successor[56] because the timing of an event that triggers the filing of a current report is variable and unknown.[57]

The proposed Rule would require that a broker-dealer or qualified IDQS obtain all current reports as of a date up to three business days prior to the initial publication or submission of a quotation.[58] At the time that the Commission adopted the existing requirement, it noted that providing five business days to obtain current reports prior to publishing a quote should alleviate uncertainties about available information, given the unpredictable timing of current reports.[59] The Commission, however, preliminarily believes that it is appropriate to shorten the window within which a broker-dealer or qualified IDQS must obtain current reports from five days to three days because, in contrast to 1991, current reports are more easily accessible by broker-dealers or qualified IDQSs on EDGAR and can be obtained in a more timely manner at low cost. The Commission is also proposing to remove from the Rule the provision regarding broker-dealers obtaining current reports five business days prior to the submission of information to FINRA pursuant to applicable FINRA rules. The Commission believes that the time period for a broker-dealer to obtain a current report should directly relate to the initial publication or submission of a quotation and should not be tied to the submission of information to FINRA because FINRA may require more time to complete its review of the proposed paragraph (b)(3) information. For example, a broker-dealer might file a Form 211 with FINRA that lacks the

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56 See Exchange Act Rule 15c2-11(d)(2)(i).

57 1991 Adopting Release at 19154.

58 See Proposed Rule 15c2-11(b)(3). Current reports filed with the Commission include (1) current reports on Form 8-K pursuant to Section 13 or 15(d) of the Exchange Act and (2) current reports on Form 1-U pursuant to Rule 257(b)(4) of Regulation A.

59 1991 Adopting Release at 19154.

information that FINRA requires to process the form, which may delay FINRA's processing of the form.

e) Expand Catch-all Issuer Information

The proposed Rule would require that information about certain issuers, including issuers that are not required to provide or file reports to the Commission, be current and publicly available, which is intended to benefit retail investors' decision-making process. Additionally, the Commission is proposing to revise some of the information required by the existing Rule to be reviewed by a broker-dealer. For example, compared to the existing Rule, the proposed Rule would require the identification of additional company officers as well as large shareholders of the company.

The Commission is proposing to amend existing paragraph (a)(5)(xi) (which would be re-lettered to proposed paragraph (b)(5)(i)(K)), to require the names of certain persons with relationships to the issuer, including the chief executive officer and members of the board of directors, to also require the names of officers or any person who is, directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security of the issuer. The Commission proposes these additions to the list of persons that must be disclosed because the Commission believes that investors could benefit from knowing the identity of officers who manage the company as well as the identity of any large shareholders. For example, investors would be able to research the background of these persons to determine whether or not they have a track record of success as an officer of a corporation, experience in the industry of the issuer,

any criminal convictions, or any other problems that raise questions about their fitness to be an officer of the issuer of a quoted OTC security.[60]

The Commission is proposing to incorporate in proposed paragraph (b) the existing presumption regarding when catch-all issuer information is "reasonably current," which is presently included in paragraph (g) of the existing Rule.[61] Proposed paragraph (b)(5)(i)(L), which pertains to the issuer's financials, would include the requirement that the issuer's balance sheet be as of a date that is less than 16 months before the publication of a quotation. Additionally, this paragraph would require that the issuer's profit and loss statement, as well as the retained earnings statement, cover the 12 months preceding the date of the balance sheet. If the balance sheet, however, is not as of a date less than six months before the publication of the quotation, the balance sheet would need to be accompanied by a profit and loss statement and a retained earnings statement, both for a period from the date of the balance sheet to a date less than six months before the publication of a quotation.

Similarly, the Commission is proposing to incorporate into proposed paragraph (b)(5) the existing presumption that "all other information specified" under the Rule for catch-all issuers is current if it is as of a date within 12 months prior to the publication or submission of the quotation.[62] Although the Commission is proposing to incorporate the presumption of "reasonably current" from existing paragraph (g), the Commission is proposing to use instead the term "current" in the context of proposed paragraph (b)(5). The Commission believes that the

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60 As a conforming change and to reduce redundancy, the Commission is also proposing to amend paragraph (b)(5)(i)(P), which focuses on quotations published by or on behalf of certain company insiders, to remove the persons enumerated in the paragraph and cross-reference to paragraph (b)(5)(i)(K).

61 See Exchange Act Rule 15c2-11(g).

62 See Exchange Act Rule 15c2-11(g)(2).

word "reasonably" is unnecessary in this context because the proposed Rule specifically enumerates what is current for purposes of catch-all issuers.

f) Modify Requirement to Make Catch-all Issuer Information Available Upon Request

The proposed Rule would modernize the Rule to permit broker-dealers to direct retail investors to electronically available information, which could make information about an issuer easier to find, compared to investors locating the information on their own, as discussed below. Consistent with the Rule's existing requirements, the proposed Rule would still require that a broker-dealer that complies with the information review requirement make certain information available to investors that request such information.[63] The Commission believes that the broker-dealer initiating quotations should assist investors in obtaining catch-all issuer information because the information might be difficult to find when a quoted market first begins. However, this requirement would be modified to provide broker-dealers the flexibility to satisfy this obligation by providing the requesting person with appropriate instructions regarding how to obtain publicly available information electronically because the Internet provides a cost-effective means to distribute catch-all issuer information to all investors, not just those that request such information. This proposed amendment would not limit other ways in which a broker-dealer could make information available.

In such instances, to the extent the broker-dealer has information regarding proposed paragraphs (b)(5)(i)(N) through (P), the broker-dealer would be required to make such

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[63] Rule 15c2-11(a)(4) and Proposed Rule 15c2-11(b)(4) include a similar requirement that broker-dealers make proposed paragraph (b)(4) information available upon request to a person expressing an interest in a proposed transaction in an exempt foreign private issuer's security.

information available to persons who request the information pursuant to proposed paragraph (b)(5)(ii).

g) Clarify the Application of the Catch-all Issuer Provision

Consistent with the Commission's efforts to increase transparency about OTC securities for all investors, the proposed Rule would specify the required information that a broker-dealer must review depending on the circumstances and the type of issuer. In particular, the provisions of proposed paragraph (b)(5) for catch-all issuers would apply to the security of any issuer that is not included in proposed paragraphs (b)(1) through (b)(4). Accordingly, if a prospectus issuer, a Reg. A issuer, a reporting issuer, or an exempt foreign private issuer does not fit within the provisions of proposed paragraphs (b)(1) through (b)(4), the issuer would be, for purposes of the proposed Rule, a catch-all issuer.

The provisions of proposed paragraphs (b)(1) and (b)(2) include specific time frames during which certain issuer information (i.e., the issuer's prospectus or offering circular) would be current, and the provisions of paragraphs (b)(1) and (b)(2) apply to an issuer only during the time frames that are identified in those paragraphs. For example, proposed paragraph (b)(1) applies only to an issuer with a registration statement that has become effective less than 90 calendar days prior to the day on which a broker-dealer publishes or submits a quotation. Similarly, proposed paragraph (b)(2) applies only to an issuer with an offering circular and that has been authorized to commence its offering less than 40 calendar days prior to the day on which a broker-dealer publishes or submits a quotation.

When proposed paragraph (b) information is as of a date outside of the time frames identified in proposed paragraph (b)(1) or (b)(2), such as when the offering is authorized to commence 100 calendar days before the publication of a quotation, the issuer is not a prospectus

issuer or a Reg. A issuer under the proposed Rule. At that time, proposed paragraphs (b)(1) and (b)(2) are no longer applicable and the issuer may be a reporting issuer or a catch-all issuer, depending on the issuer's reporting obligation. For example, an issuer that does not have an ongoing reporting obligation, such as a Reg. A issuer that has conducted a Tier 1 offering, would be a catch-all issuer, and a broker-dealer or qualified IDQS would be required to review information required by proposed paragraph (b)(5) ("proposed paragraph (b)(5) information") if the issuer's offering has been authorized to commence more than 40 calendar days prior to the day on which a broker-dealer publishes or submits a quotation. If, however, an issuer has an ongoing reporting obligation, such as an issuer that filed a prospectus more than 90 calendar days prior to the day on which a broker-dealer publishes or submits a quotation, that issuer would be a reporting issuer and a broker-dealer or qualified IDQS would be required to review proposed paragraph (b)(3) information.

Proposed paragraphs (b)(3) and (b)(4) apply to issuers that have ongoing disclosure obligations. If the reporting issuer or exempt foreign private issuer has not filed, published, or disclosed information that is current within the time frames identified in proposed paragraphs (b)(3) or (b)(4), respectively, the issuer would be, for purposes of proposed Rule 15c2-11, a catch-all issuer and, therefore, quotations of the securities of such an issuer would be subject to the provisions of proposed paragraph (b)(5) until the issuer complies with its Securities Act or Exchange Act disclosure requirements. Broker-dealers and qualified IDQSs that comply with the information review requirement for securities of these issuers would, therefore, need to review proposed paragraph (b)(5) information for the initial publication or submission of a quotation. For example, a broker-dealer that complies with the information review requirement

for a reporting issuer that has a quarterly reporting obligation but has not been timely in its reporting obligations would need to review the issuer's proposed paragraph (b)(5) information.

As explained above, the proposed amendment—that the provisions of proposed paragraph (b)(5) would apply to the publication or submission by a broker-dealer of the securities of any issuer that is not included in proposed paragraphs (b)(1) through (b)(4)—would not change any issuer's statutory or rule-based disclosure obligation. Even if catch-all issuers are not subject to a statutory or rule-based disclosure obligation, the proposed Rule would require that catch-all issuer information be current and made publicly available for a broker-dealer prior to the initial publication or submission of a quotation for the security of a catch-all issuer. The proposed amendment to apply the provisions of proposed paragraph (b)(5) to an issuer that does not fit within the provisions of proposed paragraphs (b)(1) through (b)(4), if such issuer's information described in those paragraphs is not current, would not lead to a lower information review standard. Rather, a broker-dealer would still need to have a reasonable basis under the circumstances for believing that the proposed paragraph (b) information, based on a review of such information, together with any supplemental information required by proposed paragraph (c), is accurate in all material respects and from a reliable source. For example, regardless of whether a broker-dealer is complying with the information review requirement for the security of a reporting issuer under proposed paragraph (b)(3) or a catch-all issuer under proposed paragraph (b)(5), the required review standard is the same.

Under the existing Rule, an issuer's periodic report or statement is "reasonably available" when the report or statement is filed with the Commission.[64] The Commission proposes to

[64] Exchange Act Rule 15c2-11(a)(5).

delete the "reasonably available" provision because proposed paragraph (b)(5), and its application to any issuer that is not included in proposed paragraphs (b)(1) through (b)(4) due to a delinquent filing or otherwise, renders redundant the "reasonably available" provision.

Proposed paragraph (b)(5) would classify catch-all issuers the same way as does the existing Rule. Specifically, if a reporting issuer has timely filed reports with the Commission, the issuer is, for purposes of existing Rule 15c2-11, a reporting issuer. For purposes of the proposed Rule, if the issuer's periodic reports or statements are not timely filed with the Commission, the issuer would be a catch-all issuer and a broker-dealer would need to comply with proposed paragraph (b)(5).

While the Commission welcomes any public input on the proposed amendments, including input regarding the publication of proposed paragraph (b) information, the Commission asks commenters to consider the following questions:

Q3. Should the requirement to obtain current reports filed by a reporting issuer be less than, or more than, the three days as proposed in proposed paragraph (b)(3)? Why or why not? What would be the appropriate number of days for a broker-dealer or qualified IDQS to obtain current reports in advance of publishing or submitting a quotation or submitting paragraph (b)(3) information to a registered national securities association? Should the requirement to obtain current reports include reports furnished to, rather than solely filed with, the Commission?

Q4. Are there any advantages or disadvantages regarding the various permitted means of making proposed paragraph (b) information publicly available? If so, what are they? Are there other means of making proposed paragraph (b) information publicly available and easily accessible by investors, particularly retail investors, or should any of the proposed means be modified or eliminated? What are the potential costs to issuers, particularly small businesses, of

requiring that information, including proposed paragraph (b)(5) information that is current, be made publicly available in a way that would be easily accessible to investors, particularly retail investors?

Q5. Are there any data privacy concerns the Commission should address with regard to issuers' proposed paragraph (b) information being made publicly available by someone other than the issuer? Please give examples of any concerns and how the Commission might address them in this rulemaking.

Q6. Are there any circumstances where proposed paragraph (b) information is unnecessary for an investor to be able to make an informed investment decision? What are they?

Q7. Do commenters agree that the Commission should remove references to Section 12(g)(2)(B) of the Exchange Act in proposed paragraph (b)(3)? Why or why not?

Q8. A person may violate the antifraud provisions of the securities laws by knowingly or recklessly disseminating, publishing, or republishing false or misleading information. This may include publicly available information (such as proposed paragraph (b) information), if the person knew, or was reckless in not knowing, that the information was materially false or misleading and nevertheless used that information to establish or maintain a quoted market for a security. Are there other alternatives, or additional or different approaches, that the Commission should adopt as a means reasonably designed to prevent persons from knowingly or recklessly using false information published or provided by another person to establish a quoted market for an OTC security? Commenters are invited to comment regarding any additional actions the Commission could take to further preserve the integrity of the OTC market.

Q9. Should proposed paragraph (b)(5) also require the ticker symbol of the security being quoted?

Q10. Currently, paragraph (a)(5)(ii) requires the address of the issuer's principal executive offices. Should proposed paragraph (b)(5)(i)(B) also require the address of the issuer's principal place of business if that address differs from the address of the issuer's principal executive offices?

Q11. Should proposed paragraph (b)(5)(i)(K) require additional information to help accurately identify individuals listed in proposed paragraph (b)(5)(i)(K), such as job title? Why or why not?

Q12. Should changes be made to proposed paragraph (b)(5)(i)(K) to include additional parties or persons, such as affiliates of the issuer, or promoters? For example, should proposed paragraph (b)(5)(i)(K) include the word "affiliate" as defined in Securities Act Rule 144(a)(1)? Please explain. Conversely, are there persons included in proposed paragraph (b)(5)(i)(K) that commenters believe should not be included? Please explain. Should the proposed Rule include a definition of beneficial owner? If so, how should the proposed Rule define beneficial owner? Should the definition of beneficial owner be defined by total voting power? If the proposed Rule used total voting power to define beneficial ownership, should the proposed Rule calculate total voting power to include all securities for which the person, directly or indirectly, has or shares voting power, which includes the power to vote or to direct the voting of such securities, and any shares or units of which the person has the right to acquire voting power within 60 days, including through the exercise of any option, warrant or right, the conversion of a security, or other arrangement, or, if securities are held by a member of the family, through corporations or partnerships, or otherwise in a manner that would allow a person to direct or control the voting of the securities (or share in such direction or control as, for example, a co-trustee)? Should the

method of determining the amount of beneficial ownership set forth in Exchange Act Rule 13d-3 be incorporated into paragraph (b)(5)(i)(K)? Please explain.

Q13. In addition to the information that is proposed to be required under proposed paragraph (b)(5), is there other information relating to an issuer or the trading of an issuer's security in the OTC market that could help investors to make better-informed investment decisions and, therefore, should be required to be made publicly available under proposed paragraph (b)(5)? If so, please describe this information and how it could be useful to investors.

Q14. Are there any concerns with the proposal to require that the information specified in proposed paragraph (b)(5)(i)(K) be publicly available, in particular, the name of any officer as well as any person who is, directly or indirectly, the beneficial owner of more than 10 percent of the outstanding units or shares of any class of any equity security of the issuer? Please explain. If yes, how should those concerns be resolved? Should proposed paragraph (b)(5)(i)(K) require a higher, or lower, percentage of beneficial ownership of the outstanding units or shares of any class of any equity security of the issuer? If so, what percentage of beneficial ownership should proposed paragraph (b)(5)(i)(K) use and why?

Q15. Is it useful to continue to require that the broker-dealer initiating the publication or submission of a quotation make the information it obtains and reviews reasonably available to an investor upon request even if such information must also be made publicly available, as proposed? Should this existing requirement be modified to require that any broker-dealer quoting the security must, upon request, instruct an investor as to how to access such information?

Q16. Are the time frames in proposed paragraph (b)(5)(i)(L) regarding when the balance sheet, profit and loss statement, and retained earnings statement would be current for

purposes of this section clear? If not, how should the proposed Rule be modified to clarify the time frames for the balance sheet, profit and loss statement, and retained earnings statement? Please explain. How do broker-dealers calculate the dates for which the issuer's balance sheet, profit and loss statement, and retained earnings statement are reasonably current under existing paragraph (g)(1)? Is it difficult for broker-dealers to determine what information they need to review under existing paragraph (g)(1)? If so, please explain. Would the proposed Rule make it more difficult for broker-dealers to determine what information they need to review under proposed paragraph (b)(5)(i)(L)? Please explain.

Q17. Are there ways to reduce the administrative burdens associated with the proposed Rule? In particular, are there changes to proposed paragraph (b)(5)(i)(L) that would ease compliance with the proposed Rule without minimizing investor protection? If so, please explain.

Q18. Are there more streamlined requirements that could be used in the proposed Rule? In particular, could the financial statement requirements in proposed paragraph (b)(5)(i)(L) be simplified while remaining consistent with the Rule's objective? Should the timing requirements associated with the financial statements included in proposed paragraph (b)(5)(i)(L) be simplified (e.g., all financial statements must be "as of" a date within 12 calendar months before the publication or submission of a broker-dealer's quotation)? If so, please explain.

Q19. How, and to what extent, would these proposed amendments affect liquidity, transparency, and capital formation, particularly for small issuers?

B. Proposed Amendments to Supplemental Information

1. Existing Supplemental Information Requirement

The existing Rule requires that a broker-dealer consider supplemental information about the issuer of an OTC security when evaluating whether the required information is materially accurate. In particular, paragraph (b) of the existing Rule requires a broker-dealer that complies with the information review requirement to have in its records (1) a record of the circumstances involved in the submission or publication of such quotation,[65] including the identity of the person or persons for whom the quotation is being submitted or published and any information regarding the transactions provided to the broker-dealer by such person or persons; (2) a copy of any trading suspension order or public release announcing such suspension issued by the Commission pursuant to Section 12(k) of the Exchange Act during the 12 months preceding the date of the publication or submission of the quotation; and (3) a copy or a written record of any other material information (including adverse information) regarding the issuer which comes to the broker's or dealer's knowledge or possession before the publication or submission of the quotation.

2. Proposed Amendments to Supplemental Information

Existing paragraph (b) would be re-lettered to proposed paragraph (c) and further amended to (1) add qualified IDQSs to the list of market participants that must have in their records supplemental information as specified by the Rule, and (2) revise the supplemental

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[65] The existing Rule includes a typographical error, stating that the broker-dealer must keep a record of the circumstances involved in the "submission of publication of such quotation." Exchange Act Rule 15c2-11(b)(1). The rule text should instead say "submission or publication of such quotation." The Commission is proposing to correct this error as part of its proposed technical edits, as described further below. For purposes of discussion, the Commission will use "or" rather than "of" when discussing the provisions of proposed paragraph (c).

information that broker-dealers and qualified IDQSs must have in their records of a transaction involving company insiders.

a) Supplemental Information for Qualified IDQSs

The proposal would extend the existing obligations regarding consideration of supplemental information to cover all market participants that conduct the required review, including broker-dealers and qualified IDQSs. This proposal is intended to preserve the integrity of the OTC market and to promote investor protection by helping to ensure that market participants consider material information prior to the beginning of a quoted market.

In light of the proposed review requirement for qualified IDQSs contained in proposed paragraph (a)(2), the Commission is proposing to add qualified IDQSs to the list of market participants that are required to have in their records the supplemental documents required by proposed paragraph (c). Proposed paragraph (a) would require, therefore, that both broker-dealers and qualified IDQSs have a reasonable basis under the circumstances for believing, based on a review of proposed paragraph (b) information, together with any supplemental information required by proposed paragraph (c), that the proposed paragraph (b) information is accurate in all material respects.

Similar to the existing Rule, proposed paragraph (c) would not require a broker-dealer or qualified IDQS to affirmatively seek additional information about the issuer. The proposed Rule would require, however, the broker-dealer or qualified IDQS to retain a copy or a written record of material information, including adverse information, regarding the issuer that comes to the

knowledge or possession of the broker, dealer, or qualified IDQS before the initial publication or submission of a quotation.[66]

In addition to applying to broker-dealers that provide the initial publication or submission of quotations for a an OTC security, proposed paragraph (c) would also apply to qualified IDQSs that make known to others the quotation of a broker-dealer pursuant to proposed paragraph (a)(2). If the provisions of proposed paragraph (c) were not to apply to a qualified IDQS, the qualified IDQS would not need to consider material information (including adverse information) of which it has knowledge or possession. This modification to the Rule is designed to help ensure that all market participants that comply with the information review requirement would be subject to the same requirements regarding supplemental information under the Rule, including any adverse information regarding the issuer in the market participant's knowledge or possession.

The Commission anticipates that, similar to a broker-dealer that conducts the required review, a qualified IDQS would be able to obtain the supplemental information required by proposed paragraph (c) for it to have in its records from several sources, including the issuer, broker-dealers, or investors that desire a quoted market for an OTC security. For example, a qualified IDQS might have a relationship with the issuer, such that it may obtain supplemental information directly from the issuer. Or, if a broker-dealer or investor requests that the qualified IDQS conduct the review in proposed paragraph (a)(2), the broker-dealer or investor could supply the qualified IDQS with supplemental information.

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[66] Proposed Rule 15c2-11(c)(3); see 1991 Adopting Release at 19151 n.28.

b) Supplemental Information for Company Insiders' Transactions

The proposal would require that company insiders be identified. The knowledge that a quotation is by or on behalf of a company insider could aid investors by alerting the broker-dealer conducting the required review to the possibility that the quotation is being made on behalf of a person who may have a heightened incentive to manipulate the price of the security.

The Commission is proposing to require, in proposed paragraph (c)(1), that the broker-dealer or qualified IDQS have a record of instances when the person or persons for whom the initial publication or submission of a quotation is being published is the issuer, chief executive officer, a member of the board of directors, officer, or any person, directly or indirectly, who is the beneficial owner of more than 10 percent of the outstanding units or shares of any class of any equity security of the issuer. The Commission believes that whether a quotation is being published or submitted by a broker-dealer on behalf of a company insider is important supplemental information for the broker-dealer or qualified IDQS to evaluate because a company insider might be able to influence or control the issuer of an OTC security.

Additionally, proposed paragraph (c)(1) would require broker-dealers and qualified IDQSs to retain a record of any information regarding the transactions provided to the broker-dealer or qualified IDQS by any person for whom the quotation is being published or submitted. Circumstances may arise in which a qualified IDQS does not have the supplemental information listed in proposed paragraph (c)(1) because such information is specific to a quotation or a transaction, and the qualified IDQS might not be involved in the publication or submission of a quotation or a transaction in such security. However, if a person provides this information to a qualified IDQS (e.g., the person provides information to the qualified IDQS for the qualified

IDQS to comply with the information review requirement), the qualified IDQS would be required to create a record of any information regarding such transactions.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q20. Proposed paragraph (c) would require that a broker-dealer submitting or publishing a quotation or any qualified IDQS that makes known to others the quotation of a broker-dealer pursuant to proposed paragraph (a)(2) have in its records documents and information concerning company insiders, trading suspensions, and any other material information regarding the issuer that comes to the knowledge or possession of the broker-dealer or qualified IDQS before the initial publication or submission of a quotation. Are there other documents and information that the broker-dealer or qualified IDQS should be required to have in its records? Please explain.

Q21. Currently, paragraph (b)(3) of the Rule requires that a broker-dealer submitting or publishing a quotation have in its records documents and information regarding material information (including adverse information) regarding the issuer which comes to the broker-dealer's knowledge or possession before the initial publication or submission of the quotation. We seek comment concerning the type of such information that most often falls within this existing paragraph and frequency of such occurrences.

Q22. Should proposed paragraph (c) require that a broker-dealer or qualified IDQS, affirmatively seek additional information about the issuer? Please explain. Should proposed paragraph (c)(3) use the terms "actual knowledge" or "physical possession" instead of the terms "knowledge or possession"? Please explain.

C. Proposed Amendments to the Piggyback Exception

1. Existing Piggyback Exception and Fraudulent Activity

Currently, broker-dealers do not have to comply with the Rule's information review requirement if they can rely on the piggyback exception. Under the existing piggyback exception, the Rule's provisions do not apply when a broker-dealer publishes or submits, in an IDQS, a quotation for an OTC security that was already the subject of regular and frequent quotations in that IDQS (i.e., quotations must have appeared on each of at least 12 days during the previous 30 calendar days, with no more than four consecutive business days in succession without a quotation).[67] Once these requirements are met, a broker-dealer can "piggyback" on either its own or other broker-dealers' previously published quotations.[68]

There are three ways that a broker-dealer can rely on the piggyback exception to publish or submit quotations under the existing Rule. First, a broker-dealer can rely on the exception if (1) the IDQS identifies unsolicited customer quotations for a security as such and (2) the security is continuously quoted on each of at least 12 days within the first 30 calendar days after the initial publication of quotations, with no more than four business days in succession without a quotation.[69] Second, a broker-dealer can rely on the exception if (1) the IDQS does not identify unsolicited orders for a security as such and (2) the security has been the subject of both bid and ask quotations at specified prices on each of at least 12 days within the first 30 calendar days

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[67] A broker-dealer may rely on the piggyback exception for a submission or publication concerning a security only where that submission or publication is made in an IDQS. Exchange Act Rule 15c2-11(f)(3). If a broker-dealer cannot rely on the piggyback exception or any other exception to the Rule, the broker-dealer must comply with the Rule for each quotation prior to publishing or submitting such quotation in a quotation medium.

[68] Exchange Act Rule 15c2-11(f)(3); 1991 Adopting Release at 19156.

[69] See Exchange Act Rule 15c2-11(f)(3)(i).

after the initial publication of quotations, with no more than four business days in succession without a quotation.[70] Third, once eligibility for the piggyback exception is established, a market maker may continue to publish or submit quotations in the IDQS pursuant to the exception until it stops quoting or ceases acting as a market maker in that security.[71] Under the piggyback exception, in these three circumstances, broker-dealers may publish or submit quotations without complying with the existing Rule's information review requirement.

As a result of the piggyback exception, the first broker-dealer publishing or submitting a quotation for a security is the only one that has to comply with the Rule's information review requirement; thereafter, any other broker-dealer can publish or submit quotations for the security indefinitely, without complying with the information review requirement, so long as the security is quoted in an IDQS on each of at least 12 days within the previous 30 calendar days, with no more than four consecutive business days without any quotations.[72] Consequently, broker-dealers can rely on the piggyback exception to publish or submit quotations for a security of a company that no longer makes information publicly available or that has ceased operations and no longer exists.[73]

By relying on the existing piggyback exception to publish or submit quotations for securities of companies that no longer make information publicly available or that no longer

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70 See Exchange Act Rule 15c2-11(f)(3)(ii).

71 See Exchange Act Rule 15c2-11(f)(3)(iii).

72 See 1999 Reproposing Release at 11146.

73 See Exchange Act Rule 15c2-11(f)(3)(i) and (ii); see also Order of Trading Suspension (May 14, 2012), available at https://www.sec.gov/litigation/suspensions/2012/34-66980-o.pdf; Press Release, SEC Microcap Fraud-Fighting Initiative Expels 379 Dormant Shell Companies to Protect Investors From Potential Scams (May 14, 2012), https://www.sec.gov/news/press-release/2012-2012-91htm.

exist, broker-dealers may sustain the false appearance of an active market in the securities of these issuers. In some cases, broker-dealers intentionally participate in improper activities. For example, unscrupulous company insiders may participate with a broker-dealer to publish quotations to perpetuate the company insiders' fraud, or fraudsters may usurp the identity of defunct or inactive publicly traded corporations.[74]

Another example of improper activity that arises in part due to broker-dealers' ability to rely indefinitely on the piggyback exception for these types of companies is the pump-and-dump scheme. By publishing quotations, a broker-dealer raises the public profile of a security and makes the security more accessible to investors.[75] A broker-dealer that publishes quotations in response to increased demand for the security may further facilitate the generation of fictitious demand, potentially helping perpetuate the fraud.[76] For example, unscrupulous market participants can create interest in a quoted OTC security by issuing false or misleading statements into the marketplace. Broker-dealers' continuous quotations for the security help create the appearance of an active market, seemingly "validating" the price of an essentially worthless or artificially

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[74] See Order of Suspension of Trading, Exchange Act Release No. 57486 (Mar. 13, 2008) (suspending securities of 26 companies). The Commission ordered the suspensions because of questions regarding the adequacy and accuracy of information pertaining to their status as publicly traded companies. Press Release, SEC Suspends Trading of 26 Companies to Combat Corporate Hijackings (Mar. 13, 2008), https://www.sec.gov/news/press/2008/2008-41.htm (describing how the Commission suspended trading in the securities of 26 companies that "appear to have usurped the identity of defunct or inactive publicly-traded corporations using a tactic known as corporate hijacking").

[75] Using data on daily dollar trading volume for quoted OTC securities, the Commission observes that securities with published two-way priced quotations were 3.34 times more likely to have reported a positive dollar trading volume on a given day in 2018 relative to securities with only one-way priced or unpriced published quotations. In addition, for those that were traded, quoted OTC securities with two-way priced quotations reported on average 3.05 times greater dollar trading volume than securities with only one-way priced or unpriced published quotations. See infra note 234 for a description of OTC securities data sources.

[76] See 1999 Reproposing Release at 11126.

inflated security.[77] As the security rises in price, the perpetrators of the fraud liquidate their stake at an inflated price. Once the perpetrators have cashed out and abandoned the security, the market price collapses, and innocent investors are left holding securities with little or no value.[78]

2. Proposed Amendments to the Piggyback Exception

The amendments that the Commission is proposing are designed to help curtail the use of the piggyback exception in connection with potential manipulative and fraudulent schemes that are facilitated through having false, stale, or misleading information in the OTC market. The proposed amendments seek to address, among other things, a particular vulnerability of the existing piggyback exception: once publications or submissions of quotations for securities meet the requirements of the piggyback exception, broker-dealers may rely on the piggyback exception to publish or submit quotations for those securities in perpetuity, even in the absence of current or publicly available information about the issuer of those securities.

The Commission is proposing amendments to the piggyback exception that are narrowly tailored to assist in reducing fraudulent and manipulative activity while allowing broker-dealers to rely on the piggyback exception when certain additional criteria are met. The proposed amendments would permit broker-dealers to rely on the piggyback exception for securities of catch-all issuers only when information about the issuer is current and made publicly available. The proposed amendments would also (1) restrict broker-dealers' ability to rely on the piggyback exception by limiting the exception to securities that have been the subject of both priced bid and priced ask quotations in an IDQS, (2) require a cooling-off period following a trading suspension

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77 See id., 1999 Reproposing Release at 11125.

78 Tao Li et al., Cryptocurrency Pump-and-Dump Schemes (Feb. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3267041.

to establish piggyback eligibility, (3) eliminate broker-dealers' ability to rely on the piggyback exception to publish or submit quotations for securities of "shell companies," and (4) revise the frequency of quotation requirement.

a) Current and Publicly Available Information for Catch-all Issuers

The proposal would condition reliance on the piggyback exception by requiring that information for certain issuers, including issuers that are not required to provide or file reports to the Commission, be current and publicly available. This additional transparency is intended to help retail investors make better-informed investment decisions and more easily evaluate the issuer, its security, and the market for the security.

The existing disclosure requirements for prospectus issuers, Reg. A issuers, reporting issuers, and exempt foreign private issuers specify that the type of information required by proposed paragraphs (b)(1), (b)(2), (b)(3), and (b)(4) must be publicly available.[79] In contrast, no statute or rule provides that information required by proposed paragraph (b)(5) must be made publicly available. The Commission believes that it would be more difficult for pump-and-dump schemes to succeed if proposed paragraph (b)(5) information, excluding paragraphs (b)(5)(i)(N) through (P), were current and made publicly available within six months prior to a broker-dealer's publication or submission of a quotation in an IDQS in reliance on the piggyback exception. The public availability of catch-all issuer information that is current would allow investors, who would not otherwise have access to this information, the opportunity to review and analyze such information more easily.

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[79] See, e.g., Exchange Act Rule 12g3-2(b).

The Commission is proposing to include a proviso in proposed Rule 15c2-11(f)(3)(ii) such that a broker-dealer may rely on the piggyback exception to publish or submit a quotation for a catch-all issuer only where proposed paragraph (b)(5) information, excluding paragraphs (b)(5)(i)(N) through (P), is current and has been made publicly available within six months before the date of publication or submission of such quotation. The Commission is proposing to exclude paragraphs (b)(5)(i)(N) through (P) from the required catch-all issuer information that must be current and made publicly available for a broker-dealer to rely on the piggyback exception because such information pertains to individual quotations and broker-dealers and is not issuer-specific. In this context, the Commission is specifically focusing on catch-all issuer information because reporting issuers and exempt foreign private issuers already are subject to ongoing disclosure requirements under the federal securities laws.[80]

As discussed above, however, an issuer that does not comply with its ongoing reporting or disclosure obligations would be, for purposes of proposed Rule 15c2-11, a catch-all issuer because that issuer would no longer fit within the provisions of proposed paragraphs (b)(3) or (b)(4). Thus, if a reporting issuer or exempt foreign private issuer fails to comply with its ongoing reporting or disclosure obligations, a broker-dealer may not rely on the piggyback exception to publish or submit quotations for a security of the issuer, unless the proposed paragraph (b)(5) information is otherwise current and made publicly available.[81] In this

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[80] See Proposed Rule 15c2-11(f)(3); supra note 38. As discussed above, the provisions of proposed paragraphs (b)(1) and (b)(2) include specific time frames during which certain issuer information (i.e., the issuer's prospectus or offering circular) would be current, and the provisions of paragraphs (b)(1) and (b)(2) apply only during the time frames that are identified in those paragraphs. After such time has elapsed, the issuer would be either a reporting issuer or a catch-all issuer, for purposes of the Rule, depending on the issuer's regulatory status. See supra Part III.A.2.g.

[81] See supra Part III.A.2.g.

circumstance, a broker-dealer would need to ensure that proposed paragraph (b)(5) information were both current and made publicly available before it could rely on the piggyback exception.[82] A delinquent reporting issuer or an exempt foreign private issuer that has not made timely disclosure under Rule 12g3-2(b) would continue to be a catch-all issuer until the reporting issuer files or the exempt foreign private issuer timely publishes the required information within the time frames identified in proposed paragraph (b)(3) and (b)(4), respectively (e.g., the reporting issuer is timely under the federal securities laws with respect to its obligation to file periodic and current reports after it has filed its most recent annual report).

Requiring that proposed paragraph (b)(5) information, excluding paragraphs (b)(5)(i)(N) through (P), be current and made publicly available within the six months before the date of publication or submission of a quotation in an IDQS for a broker-dealer to rely on the piggyback exception would effectively require the publication of proposed paragraph (b)(5) information semiannually. This proposed requirement would help to improve transparency of information about catch-all issuers and, therefore, should aid investors in making investment decisions. As proposed, if catch-all issuer information were no longer current or made publicly available, broker-dealers would no longer be able to rely on the piggyback exception to quote the security of that issuer. In such case, broker-dealers would need to comply with the proposed Rule for each and every publication or submission of a quotation, unless another exception to the Rule applies.

The Commission believes that investors would benefit from the information, and that the new requirement would not impose an undue burden on broker-dealers. To mitigate the potential

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[82] See supra Part III.A.2.g.

costs and burdens that this proposal might have on broker-dealers, however, the Commission is also proposing a new exception that would permit broker-dealers to rely on third party determinations that the requirements of an exception are met.[83]

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q23. Certain issuers choose not to have reporting obligations for business purposes. The proposal, however, would require proposed paragraph (b)(5) information from a catch-all issuer, excluding paragraphs (b)(5)(i)(N) through (P), to be current and made publicly available within six months before the date of publication or submission of the broker-dealers' quotation in order for broker-dealers to rely on the piggyback exception to publish or submit quotations for the security of a catch-all issuer. Is six months the appropriate time frame within which a market participant must have published proposed paragraph (b)(5) information, excluding paragraphs (b)(5)(i)(N) through (P)? If so, why? If six months is too short or too long of a time frame, what should the time frame be and why? What are the potential costs and benefits to small issuers of this requirement? For reporting issuers that are delinquent in their reporting obligations (and are treated as catch-all issuers), should the piggyback exception require a shorter time frame, such as four months, for current information? Are there alternative methods that could be used that would protect investors while minimizing costs to issuers and broker-dealers?

Q24. Would the six month time frame place an undue burden on small issuers? Would the six month time frame discourage small issuers from raising capital in the public markets? What are the potential costs and benefits to small issuers of this six month time frame? What

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[83] See Proposed Rule 15c2-11(f)(8).

alternative methods could be used to encourage quoted public markets for securities of start-ups while also distinguishing them from entities that are potential vehicles for fraudulent activity?

Q25. Are there alternatives to limiting reliance on the piggyback exception to publish or submit quotations for securities of catch-all issuers when information is no longer made publicly available or current that would benefit investors of quoted OTC securities? If so, what are they?

Q26. Should the piggyback exception not apply to publications or submissions of quotations for securities of issuers that have declared bankruptcy, filed for corporate dissolution, or otherwise taken steps to wind down their business? Why or why not?

Q27. Should the piggyback exception not apply to publications or submissions of quotations for securities of issuers that have undergone a re-organization, any major mergers and acquisitions, reverse mergers, or other significant restructuring that affects their business or management? Why or why not?

Q28. As proposed, a reporting issuer that is not current in its filing obligations would become subject to proposed paragraph (b)(5), and broker-dealers could continue to quote the issuer's security if the proposed paragraph (b)(5) information were current and made publicly available within six months of the date of the publication or submission of the quotation. Should broker-dealers be prohibited from relying on the piggyback exception to publish or submit quotations for the securities of delinquent reporting companies? Why or why not? Are there any circumstances that would make it difficult for a broker-dealer that relies on the piggyback exception to know the issuer's regulatory status and identify which provision of proposed paragraph (b) applies? Please explain.

b) Two-Way Priced Quotations

To further the Commission's goal of enhancing investor protection, the piggyback exception would be available only for securities that have both an offer to buy and offer to sell at specified prices. The Commission believes this is a characteristic of an independent and liquid market. The Commission proposes to amend the piggyback exception in proposed paragraph (f)(3)(i)(A) to allow broker-dealers to piggyback only on quotations for securities that have been the subject of both bid and ask quotations in an IDQS at specified prices—two-way priced quotations—but not on unpriced quotations.[84] Because two-way priced quotations are evidence of market interest in a security,[85] the Commission believes that two-way priced quotations are appropriate to support broker-dealers' reliance on the piggyback exception (i.e., by entering priced quotations, the broker-dealer provides substantive market information concerning its view about the value of the security).

The piggyback exception is premised on the recognition of supply and demand.[86] The Commission believes that unpriced quotations may signal only that a broker-dealer is interested in buying or selling the security, rather than that market demand for the security actually exists.

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[84] Paragraph (f)(3)(ii) of the Rule requires, and Proposed Rule 15c2-11(f)(3)(i)(B) would require, publications of quotations concerning a security to have been the subject of both bid and ask quotations in an IDQS at specified prices for a broker-dealer to rely on the piggyback exception. See Exchange Act Rule 15c2-11(f)(3)(ii); Proposed Rule 15c2-11(f)(3)(i)(B).

[85] See 1984 Adopting Release at 45121 (stating that the historical basis for the piggyback provision is that "regular and continual priced quotations are an appropriate substitute for information about the issuer which would otherwise be relevant in establishing a quotation"); see also Therese H. Maynard, What is an "Exchange?"—Proprietary Electronic Securities Trading Systems and the Statutory Definition of an Exchange, 49 Wash. & Lee L. Rev. 833, 847 (1992) (citing Norman S. Poser, Restructuring the Stock Markets: A Critical Look at the SEC's National Market System, 56 N.Y.U. L. Rev. 883, 900, 907–10, 920–21 (1981)) (explaining that publishing the prices at which broker-dealers are willing to buy and sell the stocks that they maintain in inventory is one of the principal ways that broker-dealers attract business in the form of a stream of orders for execution out of their inventory).

[86] See 1984 Adopting Release at 45121.

This proposed amendment, therefore, would conform proposed paragraph (f)(3)(i)(A) to existing paragraph (f)(3)(ii) with respect to the requirement that the security be the subject of both bid and ask quotations in an IDQS at specified prices.

As proposed, once a broker-dealer publishes or submits the initial two-way priced quotations continuously for the requisite period of time, the initiating broker-dealer and other broker-dealers would be able to rely on the piggyback exception in proposed paragraph (f)(3)(i)(A) for priced quotations. Proposed paragraphs (f)(3)(i)(A) and (f)(3)(i)(B) would require the security to have been the subject of both bid and ask quotations in an IDQS at specified prices. Although the exception would permit broker-dealers to quote on either side once piggyback eligibility is established, a security must be the subject of both bid and ask quotations at specified prices (i.e., two-way priced quotations), in the IDQS, within the previous 30 calendar days, with no more than four business days in succession without such a quotation, for a broker-dealer to establish reliance on the piggyback exception.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q29. How, and to what extent, would these proposed amendments affect liquidity, transparency, and capital formation, particularly for small issuers?

Q30. Do unpriced quotations provide any market signals that would warrant the continued reliance on the piggyback exception based on unpriced quotations? If so, what are they?

Q31. Should broker-dealers be permitted to rely on the piggyback exception if only a priced bid or a priced ask (i.e., only a one-sided quotation) is published? Why or why not?

c) After a Trading Suspension

The Commission is proposing that the piggyback exception would not be available to a broker-dealer until 60 days after the expiration of a trading suspension. The proposal is intended to provide enough time for investors to consider new or additional information that may arise in the period following the conclusion of the issuer's trading suspension.

The Commission may suspend trading in any security for up to ten trading days if, in its opinion, the public interest and the protection of investors so require.[87] The Commission has, at times, suspended trading concurrently with instituting enforcement actions alleging that an issuer has failed to comply with periodic reporting requirements or engaged in deceptive or manipulative conduct.[88] The Commission has also suspended trading in the presence of rumors and speculation in the marketplace.[89] Temporary trading suspensions are a powerful tool for "alert[ing] the investing public that there is insufficient public information about the issuer upon which an informed investment judgment can be made or that the market for the securities may be reacting to manipulative forces or deceptive practices."[90]

Further, the Commission has stated that "information in trading suspension orders is important for broker-dealers because they will be apprised of questions the Commission has

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87 See Exchange Act Section 12(k)(1).

88 See In re Bravo Enters. Ltd., Exchange Act Release No. 75775, 5 n.14 (Aug. 27, 2015); see also SEC v. ZipGlobal Holdings, Inc., Litigation Release No. 23078, 2014 WL 4384124, at *2 (Sept. 4, 2014); In re Vida Life Int'l Ltd., Release No. 72698, 2014 WL 3725012, at *1 (July 29, 2014).

89 See In re Bravo Enters. Ltd., Exchange Act Release No. 75775, 5 n.17 (citing Andros Isle Dev. Corp., Exchange Act Release No. 57486, 2008 WL 762964, at *1 (Mar. 13, 2008) ("[c]ertain persons appear to have usurped the identity of 26 defunct or inactive publicly traded corporations"); Power Conversion, Inc., Exchange Act Release No. 10002, 1973 WL 149518, at *21 (Feb. 12, 1973) (trader was "involved in a scheme to defraud and manipulate the market" in the issuer's securities)).

90 Rules of Practice, Exchange Act Release No. 35833 (June 9, 1995), 60 Fed. Reg. 32738, 32787 (June 23, 1995) (adoption of amendments).

raised regarding the issuer or its securities that should be considered when they determine to publish quotations."[91] Among other things, a Commission trading suspension could indicate that there is a lack of information about the company (e.g., the company is delinquent in its filings of required reports), uncertainty as to the accuracy of publicly available information, or questions about the trading in the stock.

A trading suspension that exceeds more than four successive business days (e.g., five business days in succession without a quotation) will eliminate broker-dealers' ability to rely on the piggyback exception to publish or submit quotations for that security once the trading suspension ends.[92] Further, quoting activity under the piggyback exception does not automatically resume when a 10-day suspension ends. Under the existing Rule, a broker-dealer must comply with the information review requirement before it can re-establish the ability to rely on the piggyback exception, unless the broker-dealer can rely on another exception to the Rule.[93] However, the existing Rule permits a broker-dealer to begin the process of re-establishing piggyback eligibility immediately after the conclusion of the trading suspension if the broker-dealer complies with the information review requirement.[94]

The Commission proposes to amend the Rule by adding a proviso to proposed paragraph (f)(3)(ii) so that a broker-dealer would not be able to rely on the piggyback exception until 60 calendar days after the expiration of a trading suspension order issued by the Commission

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91 1991 Adopting Release at 19154.

92 See Exchange Act Rule 15c2-11(f)(3)(i) and (ii).

93 See Exchange Act Rule 15c2-11(a) and (f).

94 See Exchange Act Rule 15c2-11(a) and (f)(3)(i) through (ii).

pursuant to Section 12(k) of the Exchange Act.[95] This means that, if a broker-dealer were to perform the required review and begin to publish or submit quotations upon the expiration of a Commission-ordered trading suspension (e.g., on April 1), the 30 calendar days following the expiration of the trading suspension would not count toward establishing piggyback eligibility. Instead, the broker-dealer's quotations that are published on days 31 through 60 (i.e., May 1 through May 30) would count toward meeting the piggyback exception's frequency of quotations requirement. In this scenario, on day 61 (i.e., on May 31), after the expiration of the trading suspension, assuming that the frequency of quotation requirements have been satisfied, other broker-dealers would be able to rely on the piggyback exception to publish quotations.

The limitation of 60 calendar days in the proposed proviso is intended to incorporate the 30-day timing requirement of the existing piggyback exception and to reflect the specific policy rationale behind the piggyback exception: regular and frequent quotations, including regular and frequent two-sided market making, reflect independent supply and demand forces, thereby indicating that sufficient information about the issuer of the quoted security is reaching the marketplace.[96] A trading suspension order issued by the Commission pursuant to Section 12(k) of the Exchange Act can serve as a signal of insufficient public information about the issuer upon which an informed investment judgment can be made. In the case of a formerly suspended security, adding 30 days to the piggyback exception's existing timing requirement of 30 days

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[95] See Proposed Rule 15c2-11(f)(3)(ii). Commission orders pertaining to trading suspensions issued under Section 12(k) of the Exchange Act are available through the Commission's website at https://www.sec.gov/litigation/suspensions.shtml. While the Commission is not proposing to require that the broker-dealer obtain and review any trading suspension for a foreign security that was issued by a foreign financial regulatory authority, this information must be taken into account by the broker-dealer if it comes to the broker-dealer's knowledge or possession at the time that a review is required. See Proposed Rule 15c2-11(a)(1) and (c)(3).

[96] See 1984 Adopting Release at 45121. The existing piggyback exception has a timing requirement of 30 calendar days after initiation (or resumption) of quotations. See Exchange Act Rule 15c2-11(f)(3)(i) and (ii).

would help to ensure that regular and frequent quotations reflect independent supply and demand forces, thereby indicating that sufficient information about the issuer of the quoted security is reaching the marketplace.

Further, the Commission believes that a longer period of 60 calendar days should provide investors with a better opportunity to consider new or additional information that may arise in the period following the conclusion of the issuer's trading suspension. The Commission believes that this proposed limitation would help to ensure that regular and frequent quotations for the securities of formerly suspended issuers generally reflect market supply and demand and are based on informed pricing decisions rather than on pricing decisions that are based on information that is no longer accurate or that (potentially) had led the issuer to be suspended.

d) Shell Companies

The proposed amendments to the piggyback exception would prohibit broker-dealers from relying on the piggyback exception for shell companies. This proposed amendment is intended to help retail investors by preventing shell companies, which can be used as vehicles for fraud, from maintaining a quoted market. Currently, the piggyback exception may result in broker-dealers contributing to a quoted market in securities of shell companies, which may collaterally facilitate fraudulent and manipulative schemes involving "shell factories."[97] Specifically, offering documents or other filings for some shell companies may contain false or misleading statements regarding the company's business plan; its officers, directors, nominees,

[97] In a shell factory scheme, fraudsters typically create and sell securities of numerous purportedly actual public companies that are, in fact, shams. In furtherance of such schemes, fraudsters file false and misleading registration statements that falsely depict startup companies' operations and expected profits to convince investors to purchase these companies' securities. To add value to the shell companies as reverse merger candidates, fraudsters solicit broker-dealers to file false Forms 211 with FINRA, without complying with the provisions of Rule 15c2-11, for the securities of the shell company to be quoted and traded in the OTC market. The fraudsters sell the startup companies as empty shells rather than implementing the business plans of such companies.

and shareholders; or control of the company. The Commission does not believe that securities of shell companies should be continuously quoted pursuant to an exception that presumes that sufficient information about the issuer of the quoted security is reaching the marketplace.[98] A continuously quoted market can increase the share price of a shell company that may have been promoted using inaccurate or misleading representations and could allow fraudsters to more easily fool new investors into believing there is an active and independent market for its security.

To become a company with a publicly quoted market, a private company may engage in a reverse merger with a publicly traded shell company. In this manner, the private company obtains the benefits of a public market for its securities. The company that emerges from a reverse merger could be a completely different company than the shell company that existed before the merger took place. Very often, when the shell company is not a reporting company, there is no or limited publicly available information about the post-merger company.[99]

Although reverse mergers can take place for valid, non-fraudulent purposes, the Commission has noted that unregistered "reverse mergers" between privately held companies and publicly traded shell companies "commonly are used to develop a market for the merged entity's securities, often as part of a scheme to 'pump-and-dump' those securities."[100] Numerous

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98 See 1984 Adopting Release at 45121.

99 Item 5.06 of Form 8-K requires disclosure of the material terms of a completed transaction that has the effect of causing a company to cease being a shell company, and Items 2.01(f) and 9.01(c) together require filing Form 10 level information within four business days after completion of the transaction. In addition, entry into the agreement may trigger Form 8-K Item 1.01 (Entry Into a Material Definitive Agreement), and the completion of the transaction may trigger Form 8-K Item 5.01 (Changes in Control of Registrant). Exchange Act Rules 13a-19 and 15d-19 impose disclosure requirements comparable to Item 5.06 of Form 8-K on foreign private issuers that complete transactions in which they cease to be shell companies.

100 Registration of Securities on Form S-8, Securities Act Release No. 7646 (Feb. 25, 1999), 64 FR 11103, 11106 (Mar. 8, 1999).

enforcement actions over the past several years have involved fraud arising from shell companies, often in the context of reverse mergers.

The proviso in proposed paragraph (f)(3)(ii) would prohibit broker-dealers from relying on the piggyback exception to publish or submit quotations for securities of an issuer that meets the proposed definition of "shell company": any issuer, other than a business combination related shell company as defined in Rule 405 of Regulation C, or an asset-backed issuer, as defined in Item 1101(b) of Regulation AB, that has (1) no or nominal operations and (2) either (i) no or nominal assets, (ii) assets consisting solely of cash and cash equivalents, or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets.[101] The proposal should not prohibit reliance on the piggyback exception for quotations of startup companies or companies with a limited operating history.[102] When reliance on the piggyback exception initially is established to publish or submit quotations for the securities of a startup company, the company may, indeed, be a company with a limited operating history without meeting the proposed definition of "shell company." Over time, however, that company might become a shell company within the definition under the proposed Rule if, for example, the issuer continues to have minimal assets and liabilities without conducting any operations. Under the proposed amendment, broker-dealers would need to remain vigilant regarding whether they may rely on,

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101 See infra Part III.H.2; Proposed Rule 15c2-11(e)(8).

102 See Revisions to Rules 144 and 145, Securities Act Release No. 8869 (Dec. 6, 2007), 72 FR 71546, 71557 n.172 (Dec. 17, 2007). The Commission has stated that startup companies that have limited operating history do not meet the condition of having "no or nominal operations" for the purposes of Rule 144(i)(1)(i). See id. The Commission also believes that this statement is appropriate in the context of broker-dealers determining whether a company fits within the meaning of "shell company" as defined in Proposed Rule 15c2-11(e)(8) when deciding whether they may rely on the piggyback exception.

or continue to rely on, the piggyback exception if the issuer of that security becomes a shell company.

The Commission is mindful that the proposal could increase burdens for broker-dealers in determining whether the issuer has become a shell company within the proposed definition. To mitigate costs associated with this determination, the Commission proposes to allow broker-dealers to rely on a publicly available determination by a qualified IDQS or by a registered national securities association that the securities are eligible for the piggyback exception, as discussed further below.[103]

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q32. Should broker-dealers be prohibited from relying on the piggyback exception to publish or submit quotations for securities of shell companies? Why or why not?

Q33. Are there specific types of shell companies that participate in reverse mergers and act as the surviving company such that broker-dealers should be able to rely on the piggyback exception to publish or submit quotations for securities of these shell companies? If so, how should the Commission define such shell companies?

Q34. How, and to what extent, would these proposed amendments affect liquidity, transparency, and capital formation, particularly for small issuers?

Q35. Please describe alternative approaches, as well as their costs and benefits, to address the problems that may arise in the context of Rule 15c2-11 concerning mergers and acquisitions between shell companies and private operating companies.

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[103] See infra Part III.F; Proposed Rule 15c2-11(f)(8).

Q36. Is the proposed definition of "shell company" appropriate? Please explain why or why not. Should a definition of "shell company" that is different from the one that is being proposed today be used? If so, please explain and provide examples.

e) Frequency Requirements for the Piggyback Exception

The proposal would eliminate the 12-day requirement in the piggyback exception to modernize the existing Rule in alignment with the current electronic OTC trading market. Currently, a broker-dealer may rely on the piggyback exception without complying with the Rule's information review requirement if the publication or submission of a quotation for a security meets the frequency requirements and is published in an IDQS on each of at least 12 days within the previous 30 calendar days, with no more than four business days in succession without a quotation.[104] The Commission proposes to remove the quoting frequency requirement of "12 business days" in light of the evolution of the OTC market from a daily paper publication to a dynamic, electronic trading market. The Commission believes that the 12-day requirement is no longer necessary with the technological advances that have taken place since this provision was adopted because it is now easier for broker-dealers to continuously update and widely disseminate quotations and information about issuers to investors.[105] As proposed, for a broker-dealer to rely on the piggyback exception, the quoted OTC security would need to be the subject of two-way priced quotations within the previous 30 calendar days, with no more than four business days in succession without such a quotation.[106] The proposed amendment to remove

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104 Exchange Act Rule 15c2-11(f)(3)(i) and (ii).

105 See infra Part VIII.C.1.b (estimating that only nine of over 10,000 issuers had fewer than 12 days of published quotations within 30 previous calendar days, with no more than four business days in succession without a quotation).

106 See Proposed Rule 15c2-11(f)(3)(i)(A) and (B).

the 12-day requirement would not alter the existing exception's provision relating to the absence of quotations, which is the requirement that no more than four consecutive business days elapse without a two-way quotation.[107] For example, if over a 30-calendar-day window, no quotations were published in an IDQS on Mondays through Thursdays but two-way priced quotations were published on each of the Fridays, broker-dealers would be able to rely on the piggyback exception.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q37. Commenters are requested to provide views on whether maintaining the frequency requirements of 30 days and no more than four business days in succession without a quotation, as proposed, is necessary or effective to curtail fraud where the piggyback exception has been implicated. What are the costs and benefits of having these frequency requirements?

Q38. Should the 12-day requirement in the existing piggyback exception be retained? Please explain why or why not. What are the costs and benefits of continuing to require at least 12 days of quotations within the previous 30 calendar days?

Q39. Please discuss whether and how the elimination of the 12-day requirement could impact the integrity of the OTC market. In particular, please discuss whether the elimination of the 12-day requirement could contribute to a quoting environment that is more susceptible to fraudulent and manipulative schemes.

Q40. Are there alternative frequency requirements that would be more effective to achieve the objectives of the proposed Rule? Please explain.

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[107] See, e.g., 1984 Adopting Release at 45121.

Q41. We understand that quotations are often automated and can occur on a daily basis. Are there situations in which quotations that are published or submitted in reliance on the piggyback exception are not published or submitted on each trading day within the previous 30 calendar days? Please discuss.

Q42. Prior to the creation of electronic markets for OTC securities, a broker-dealer that complied with the information review requirement to initiate the publication or submission of quotations for a security, in essence, was the sole publisher of quotations for that security for 30 calendar days of publication, unless another broker-dealer also complied with the information review requirement for that security. The Commission understands that the process of initiating quotations before becoming eligible to rely on the piggyback exception has had the practical effect of incentivizing one broker-dealer to undertake the costs associated with initiating quotations for a security. Once reliance on the piggyback exception is established, other broker-dealers ride on the coattails of the broker-dealer that initiated quotations to comply with the Rule's provisions.[108] Such costs and effort should be greatly reduced with today's technological improvements that have streamlined the ability to obtain information about a company and publish quotations. In light of these considerations, should the 30-day requirement also be removed? What are the costs or benefits, if any, of removing the 30-day requirement while maintaining the no more than four business days in succession without a quotation requirement?

Q43. How, and to what extent, would the elimination of these frequency requirements help to facilitate or impede liquidity, transparency, and capital formation, particularly for small issuers?

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[108] See 1998 Proposing Release at 9664.

f) General Request for Comment Regarding the Piggyback Exception

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q44. Please discuss any concerns with the proposed paragraph (f)(3)(ii) proviso "that this paragraph (f)(3) shall apply to a publication or submission of a quotation concerning a security of an issuer included in paragraph (b)(5) of this section only where the information required by paragraph (b)(5) (excluding paragraphs (b)(5)(i)(N) through (P)) is current and has been made publicly available within six months before the date of publication or submission of such quotation" (emphasis added). In particular, please discuss whether there is a concern that investors may not have sufficient notice of a potential loss of a quoted market for a particular security where the piggyback exception becomes unavailable due to proposed paragraph (b)(5) information no longer being current and publicly available (e.g., the information is not updated by the conclusion of the six-month period). Please discuss any ways to address the provision of such notice or any other concerns.

Q45. Should proposed paragraph (f)(3)(ii) permit a grace period during which a security could continue to be quoted in reliance on proposed paragraph (f)(3) for a certain number of days following the expiration of such six-month period? What is the appropriate length of such a grace period? For example, is 15 days an appropriate grace period, or should such period be longer or shorter? Please explain. If the piggyback exception were to permit such a grace period, should proposed paragraph (f)(3)(ii) also include in the proviso, for example, that "proposed paragraph (f)(3) shall not apply to the publication or submission of a quotation concerning a security of an issuer included in proposed paragraph (b)(5) unless such

quotation for such security is published or submitted in an IDQS that specifically identifies quotations concerning any security of an issuer for which proposed paragraph (b)(5) has not been made publicly available within six months before the date of publication or submission of such quotation"? Should such notice be in the form of a special "tag" on the quotation, similar to how unsolicited indications of interest are designated? Alternatively, should a notice be continuously and prominently posted on the IDQS's website throughout the grace period? Please explain.

Q46. Alternatively, instead of a grace period, should proposed paragraph (f)(3)(ii) include in the proviso that "proposed paragraph (f)(3) shall not apply to the publication or submission of a quotation concerning a security of an issuer included in proposed paragraph (b)(5) unless such quotation for such security is published or submitted in an interdealer quotation system that specifically identifies that such proposed paragraph (b)(5) information must be made current and publicly available within 30 calendar days for this paragraph (f)(3) to continue to apply"? Please explain.

Q47. To promote consistency in the operation of the proposed Rule and the expiration of piggyback eligibility, should proposed paragraph (f)(3)(ii) also include in the proviso that "proposed paragraph (f)(3) shall apply to the publication or submission of a quotation concerning a security of an issuer included in proposed paragraph (b)(5) until the end of the calendar month in which the proposed paragraph (b)(5) information ceases to be current and publicly available"? Please explain.

Q48. Please discuss the advantages or disadvantages of any of the above-discussed provisos to investors, issuers of OTC quoted securities, and other market participants. What, if any, impact would specifically identifying these types of quotations have on liquidity? Please explain. What would be the costs and benefits of including any of the above-discussed

provisos? Please explain. Are any of these provisos workable? Are there suggestions to revise the proviso to improve workability; for example, should a broker-dealer be required to provide notice to the IDQS that the proposed paragraph (b)(5) information has not been made publicly available and piggyback eligibility is about to expire? Please explain.

Q49. Is there a certain price threshold below which the piggyback exception should not apply? Why or why not? Commenters are requested to please provide any data they might have. If so, how should such a price threshold be measured? For example, should the threshold amount apply to the 30-day weighted average price of the security if the security is priced below a certain amount for more than 12 months?

Q50. It is the Commission's understanding that broker-dealers tend to rely on the exception to the Rule provided in existing paragraph (f)(3)(i) and that broker-dealers tend not to rely on the exception in existing paragraphs (f)(3)(ii) and (f)(3)(iii). Should existing paragraph (f)(3)(ii), which allows broker-dealers to rely on the piggyback exception to publish or submit quotations in an IDQS that does not identify unsolicited customer indications of interest, be eliminated from the Rule? Why or why not? How, and to what extent, would such elimination affect liquidity, and capital formation, particularly for small issuers? Should proposed paragraphs (f)(3)(i)(A) and (f)(3)(i)(B) be combined? Why or why not? Should existing paragraph (f)(3)(iii), which allows market makers to piggyback off of their own quotations, be eliminated from the Rule? Why or why not? How, and to what extent, would such elimination affect liquidity and capital formation, particularly for small issuers? How would investors be affected? How, and to what extent, do market participants rely on these exceptions? Do market participants anticipate relying on them given the other amendments the Commission is proposing today? Why or why not?

D. Proposed Amendments to the Unsolicited Quotation Exception

1. Existing Unsolicited Quotation Exception

Currently, broker-dealers can publish quotations for unsolicited customer quotations without complying with the information review requirement. The existing Rule excepts from the information review requirement the publication or submission of quotations by a broker-dealer where the quotations represent unsolicited customer orders.[109] When the exception was adopted, the Commission stated its belief that quotations representing unsolicited customer interest presented little potential for manipulative abuse[110] because such trading interest was not initiated by the broker-dealer, and thus the broker-dealer would not have had a motive to affect the price for the security involved.[111] However, this may no longer be the case today. The Commission is concerned that certain persons may have the incentive to use the unsolicited quotation exception to avoid the Rule's information review requirement for improper purposes. As discussed below, the proposed amendments to the unsolicited quotation exception are designed to reduce the potential for misuse of this exception.

2. Proposed Amendments to the Unsolicited Quotation Exception

Under the proposal, the unsolicited quotation exception would not be available for company insiders if the information required to be reviewed under the Rule was not current and publicly available. This proposed amendment is intended to help retail investors by encouraging corporate insiders to make publicly available current information about the company.

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109 Exchange Act Rule 15c2-11(f)(2).

110 See 1984 Adopting Release at 45120.

111 Id.; see also Initiation or Resumption of Quotations Without Specified Information, Exchange Act Release No. 19673 (Apr. 14, 1983), 48 FR 17111, 17113 (Apr. 21, 1983).

To rely on the proposed unsolicited quotation exception, a broker-dealer would need to determine whether proposed paragraph (b) information is current and publicly available. If so, a broker-dealer would not need to determine whether the quotation would be published or submitted by or on behalf of a company insider (i.e., the chief executive officer, members of the board of directors, officers, or any person, directly or indirectly the beneficial owner of more than 10 percent of the outstanding units or shares of any class of any equity security of the issuer). However, if a broker-dealer that seeks to rely on the proposed unsolicited quotation exception determines that proposed paragraph (b) information is not current and publicly available, such broker-dealer would need to determine whether the quotation would be published or submitted by or on behalf of a company insider. As proposed, a broker-dealer may not rely on the unsolicited quotation exception when (1) the quotation would be published or submitted by or on behalf of a company insider and (2) proposed paragraph (b) information is not current and publicly available.

a) Current and Publicly Available Information

Proposed paragraph (f)(2)(ii) would permit a broker-dealer to publish or submit a quotation by or on behalf of certain company insiders in reliance on the unsolicited quotation exception only if proposed paragraph (b) information is current and publicly available, as defined under proposed paragraphs (e)(1) and (e)(4), respectively. This proposed requirement is intended to help prevent the potential misuse of the unsolicited quotation exception by company insiders who may take advantage of access to information about the company that is not available to non-insiders by, for example, creating the appearance of an active market in quoted OTC securities to entice new investors to invest, or to facilitate pump-and-dump schemes.

Further, the proposal should encourage greater transparency for investors. For instance, a company insider may be incentivized to use his or her status within the company to encourage the issuer to provide or publish information so that a broker-dealer could rely on the unsolicited quotation exception. In addition, the proposed amendments to the Rule would not preclude a company insider from engaging in trading activity; Rule 15c2-11 applies only to the publication and submission of quotations in a quotation medium. Thus, the Rule, as proposed, would not prevent a company insider's purchases or sales in response to quotations.

b) Company Insiders

For purposes of proposed paragraph (f)(2)(ii), quotations published or submitted by or on behalf of company insiders would include quotations published or submitted, directly or indirectly, by or on behalf of the chief executive officer, members of the board of directors, officers, or any person, directly or indirectly, the beneficial owner of more than 10 percent of the outstanding units or shares of any class of any equity security of the issuer. Such company insiders may have a heightened incentive to engage in misconduct to artificially affect the price and trading volume of an OTC security; for example, company insiders may stand to profit by selling the company shares they own during a pump and-dump scheme. Such company insiders may also have the ability to control or influence the amount and type of information that an issuer provides to the public.

The chief executive officer, members of the board of directors, and officers have the ability to influence, and, in some cases, control the issuer's activities, including the extent and use of information it makes available to the public. The ability to influence or control the issuer's activities potentially provides persons exercising such influence or control with both the incentive to use such information to artificially affect the price of the company's securities as

well as the ability to make information available to investors. Beneficial ownership of more than 10 percent of an issuer's equity securities indicates a concentration of ownership that may increase a person's control over the issuer. Such control may give a person the ability to influence whether and to what extent there is public information about the issuer.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q51. How frequently do broker-dealers rely on the unsolicited quotation exception? Commenters are requested to please provide data to support their answer if possible.

Q52. Please discuss whether, and to what extent, the proposed amendments to the unsolicited quotation exception, if adopted, would impact liquidity, capital formation, investor protection, and the integrity of the OTC market or other markets.

Q53. Please discuss whether, and to what extent, the proposed amendments to the unsolicited quotation exception, if adopted, would impact company insiders. Please discuss ways to mitigate any undue impact on company insiders while preventing misuse of the exception to facilitate fraudulent and manipulative schemes.

Q54. Should the Rule retain the unsolicited quotation exception in its existing form? Please explain why or why not.

Q55. Is there an alternative way to modify the exception that would help to prevent misuse of the exception to facilitate fraudulent and manipulative schemes? If so, please describe specific modifications to the exception and any resulting benefits and costs.

Q56. Please discuss any advantages and disadvantages of rescinding the unsolicited order exception.

Q57. The proposed amendments would make the unsolicited quotation exception unavailable for publications of quotations by or on behalf of certain persons—the chief executive officer, members of the board of directors, officers or any person, directly or indirectly, the beneficial owner of more than 10 percent of the outstanding units or shares of any class of equity security of the issuer—unless proposed paragraph (b) information is current and publicly available. Are there additional persons that should be included in this list (e.g., an affiliate of the issuer) with respect to the unsolicited quotation exception? If yes, should such terms be defined? Are there existing definitions in other rules or regulations that could be used in this context? Why would the use of such other definitions be appropriate? Should the limitation of the unsolicited quotation exception for quotations of beneficial owners be a higher, or lower, percentage of beneficial ownership of the outstanding units or shares of any class of any equity security of the issuer? If so, what percentage of beneficial ownership should the unsolicited quotation exception use and why? Please explain.

Q58. Please describe how a broker-dealer would determine that a quotation is made by or on behalf of the chief executive officer, members of the board of directors, officers or any person, directly or indirectly, the beneficial owner of more than 10 percent of the outstanding units or shares of any class of equity security of the issuer.

Q59. Should beneficial ownership of an issuer's convertible bonds be included in the calculation of the percentage of ownership for purposes of determining whether a person is a company insider for purposes of the proposed unsolicited quotation exception? Please explain.

E. Proposed New Exceptions to Reduce Burdens

Currently, paragraph (f) of Rule 15c2-11 provides conditional exceptions to the Rule's

information review requirement.[112] The Commission is proposing to add three new exceptions to the Rule to reduce burdens on broker-dealers where the Rule's goals can be achieved through alternative means, for example, where adequate issuer information is current and publicly available, or where a regulated entity performs a similar review of the issuer in connection with an offering or otherwise complies with the Rule's proposed information review requirement.[113] The Commission preliminarily believes that applying the Rule in these three cases does not further its policy goals and investor protections.

1. ADTV and Asset Tests

The Commission is proposing to add an exception to the Rule to except a broker-dealer from conducting the information review if the security is highly liquid and the issuer is well capitalized. This amendment may provide retail investors with greater price transparency because securities of issuers that may currently meet the exception, but are not quoted, may develop a quoted market. Furthermore, this proposed exception could facilitate capital formation by removing the required review for securities that are less susceptible to fraud and manipulation based on liquidity of the securities and size of the issuer. In addition, fraudulent and manipulative schemes, such as pump-and-dump schemes, or other abusive activities involving OTC securities, generally do not involve issuers with substantial assets.[114]

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112 The existing exceptions to the Rule include (1) quotations of a security admitted to trade on a national securities exchange; (2) quotations representing a customer's unsolicited indication of interest; (3) quotations for a security that meets the requirements of the piggyback exception; (4) quotations for a municipal security; or (5) quotations of a security that is traded on the Nasdaq Stock Market, which exception the Commission is proposing to eliminate. See Exchange Act Rule 15c2-11(f)(1) through (5).

113 See Proposed Rule 15c2-11(f)(5) through (7).

114 For example, the typical pump-and-dump scheme most often involves issuers with limited assets and thinly traded securities. See infra note 124.

The first proposed exception, contained in proposed paragraph (f)(5), is conditioned on an OTC security satisfying a two-prong test based on (1) the security's average daily trading volume ("ADTV") value during a specified measuring period (the "ADTV test"); and (2) the issuer's total assets and unaffiliated shareholders' equity (the "asset test"). To rely on the proposed new exception from complying with the Rule's information review requirement, a broker-dealer would need to determine that both prongs of the exception are met.[115] Proposed paragraph (f)(5)(ii) would also include a proviso that limits the availability of the new exception to those quoted OTC securities where proposed paragraph (b) information is current (i.e., in accordance with the proposed definition of current, which would incorporate time frames identified in proposed paragraphs (b)(1) through (b)(5)) and publicly available. While the proposed exception is intended to ease burdens on broker-dealers publishing quotations for quoted OTC securities, the proviso is designed to limit the exception to those OTC securities that have greater transparency and are less likely to be involved in fraudulent and manipulative conduct in the OTC market.

a) ADTV Test

The first prong of the new exception in proposed paragraph (f)(5)(i)(A) would except publishing or submitting a quotation for a security with a worldwide ADTV value of at least

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(footnote continued)
A 2018 analysis of 318 quoted OTC securities that were the subject of recent Commission-ordered trading suspensions showed that the issuers, on average, had approximately $86.14 million in total assets, with a median of approximately $1.04 million of total assets. They also had an average of $10.42 million in shareholders' equity, with a median of approximately negative $0.26 million. Although the average total assets and shareholders' equity amounts are higher than the proposed thresholds for the asset test, as of the date of this proposal, no issuer subject to a trading suspension satisfied both the ADTV test and the asset test, the combination of which the Commission is proposing herein.

[115] However, as noted below, the excepted broker-dealer would still be subject to the recordkeeping requirement in proposed paragraph (d)(2) of the Rule. Additionally, the broker-dealer could rely on the determination made by an appropriate third party pursuant to proposed paragraph (f)(8), as discussed below.

$100,000 during the 60 calendar days immediately before the date of publishing such quotation.[116] This $100,000 ADTV value threshold, which would need to be calculated daily using the ADTV value over the preceding 60-calendar-day measuring period, is intended to mirror the threshold that is used in Rules 101 and 102 of Regulation M, which, similarly, is designed to prevent manipulative activities but in connection with a distribution of securities.[117] The ADTV value threshold and 60-calendar-day measuring period also are designed to focus the proposed exception on the types of securities that typically are not the subject of Commission-ordered trading suspensions or the subject of fraudulent and manipulative conduct, including the type of short-term manipulation that is frequently seen in connection with microcap securities, as a result of their greater level of OTC market liquidity.[118]

The Commission believes that the majority of quoted OTC securities of U.S. companies without a published quotation in an IDQS trade infrequently and are unlikely to have an ADTV

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[116] See Proposed Rule 15c2-11(f)(5)(i)(A). The proposed threshold of securities with an ADTV value of $100,000, as well as $50 million in total assets and $10 million in shareholders' equity, as discussed below, was suggested by commenters on the Rule's 1999 release and others, including IDQS operators. See, e.g., Letter from Lee B. Spencer, Jr. & R. Gerald Baker, Securities Secs. Indus. Ass'n, to Jonathan G. Katz, Sec'y, SEC (May 6, 1999), available at https://www.sec.gov/rules/proposed/s7599/spencer2.htm ("SIA Letter"). Commenters on the 1999 Reproposing Release also suggested reducing the previously proposed ADTV measuring period from six full calendar months to 60 days as in Regulation M. See id.

[117] The Commission believes using Regulation M as a model is appropriate because Regulation M's ADTV standard is relevant for determining which securities are more difficult to manipulate. See, e.g., Anti-Manipulation Rules Concerning Securities Offerings, Exchange Act Release No. 38067 (Dec. 20, 1996), 62 FR 520 (Jan. 3, 1997). Under Regulation M, a security's ADTV value is determined based solely on information that is publicly available and from a reasonable source. See supra note 116 and accompanying text. Regulation M uses a similar ADTV test to support a shorter (one business day) restricted period for securities with an ADTV value of at least $100,000 as measured over a 60-day period, if the issuer has a public float value of at least $25 million. See Rule 100 of Regulation M. While Regulation M is intended to prevent manipulative activities during a "distribution," as that term is defined in Regulation M, the proposed exception would use a similar ADTV value threshold over a 60-calendar-day measuring period in order to focus the Rule on more thinly traded, microcap securities that are more likely to be involved in a short-term price manipulation in the OTC market. However, the assets prong of the proposed exception, discussed below, does not use Regulation M's public float test because public float is based on market prices, which can be volatile. The asset prong instead uses shareholder equity, which is book value and is based on information included in the issuer's audited balance sheet.

[118] See infra note 254 and accompanying text.

value of $100,000 or more during the 60-calendar-day measuring period to satisfy the first prong under proposed paragraph (f)(5)(i)(A). The Commission understands that quoted OTC securities involved in fraud and manipulation often are thinly traded and that the ADTV for such securities rarely reaches a value of $100,000 over an extended period of time. Thus, the Commission believes that the ADTV test should help to narrowly tailor the exception to exclude securities that are more likely to be involved in short-term price manipulation in the OTC market.

To satisfy the proposed ADTV test, a broker-dealer generally would be able to determine the value of a security's ADTV from information that is publicly available and that the broker-dealer has a reasonable basis for believing is reliable.[119] Generally, any reasonable and verifiable method may be used (e.g., ADTV value could be derived from multiplying the number of shares by the price in each trade).[120]

b) Asset Test

In addition to the ADTV test (first prong), the Commission is proposing to include a second prong to the exception in proposed paragraph (f)(5)(i)(B) that would limit the availability of the proposed exception to quoted OTC securities of issuers that have at least $50 million in total assets and unaffiliated shareholders' equity of at least $10 million (as reflected on the issuer's publicly available audited balance sheet issued within six months of the end of the

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[119] For instance, a broker-dealer could rely on trading volume as reported by self-regulatory organizations ("SROs") or comparable entities. Electronic information systems that regularly provide information regarding securities in markets around the world also provide a reliable means to determine worldwide trading volume in a particular security.

[120] This is similar to the guidance in Regulation M regarding how to calculate ADTV value. See Anti-manipulation Rules Concerning Securities Offerings, Exchange Act Release No. 38067 (Dec. 20, 1996), 62 FR 520, 527 (Jan. 3, 1997).

issuer's most recent fiscal year).[121] The second prong's proposed combined thresholds (i.e., OTC securities of issuers having at least $50 million in total assets and unaffiliated shareholders' equity of at least $10 million) are based on an analysis of quoted OTC securities that had been the subject of Commission-ordered trading suspensions.[122] The asset test is intended to narrowly tailor the proposed Rule to apply to those securities that the Commission believes are more likely to be involved in fraudulent or manipulative schemes in the OTC market. Using "unaffiliated" shareholder equity (i.e., equity that is not owned by shareholders that are affiliated with the issuer) is intended to further reduce the likelihood of the exception being applied in cases where there may be a heightened incentive to engage in fraudulent or manipulative conduct.

To determine whether publishing or submitting a quotation for a quoted OTC security of a particular issuer would meet the required asset test under proposed paragraph (f)(5)(i)(B), a broker-dealer would need to look to an audited balance sheet issued by the issuer (within six months of the end of the issuer's most recent fiscal year) that has been audited by an independent public accountant who has prepared a report in accordance with the provisions of Rule 2-02 of Regulation S-X. For exempt foreign private issuers, a broker-dealer would make this determination using the balance sheet that is prepared in accordance with a comprehensive body of accounting principles, audited in compliance with requirements of the country of incorporation, and reported on by an accountant in good standing under the regulations of that jurisdiction.[123]

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121 See Proposed Rule 15c2-11(f)(5)(i)(B).

122 See infra note 124 and accompanying text.

123 This balance sheet may be found in filings with the Commission on Forms 20-F or 6-K, or publications by the issuer pursuant to Exchange Act Rule 12g3-2(b) or elsewhere.

A broker-dealer would be permitted to rely on this exception only where the issuer's recent publicly available audited balance sheet was issued within six months from the end of the issuer's most recent fiscal year. A broker-dealer could use an issuer's audited balance sheet from the prior fiscal year (i.e., the year before the most recent fiscal year) until either (1) the issuer issued an audited balance sheet from the most recent fiscal year, or (2) six months have passed after the end of the issuer's most recent fiscal year, if the issuer still has not issued a more recent audited balance sheet. The six month period following the end of the issuer's most recent fiscal year is intended to provide sufficient time for the issuer's audited balance sheet to be prepared and issued.

To qualify for the proposed exception, proposed paragraph (b) information must also be current and publicly available. These timing requirements should help to ensure that information available to investors is not stale, and the requirements align with existing industry standards with respect to when audited balance sheets must be issued. At the same time, because the typical pump-and-dump scheme often involves issuers with limited assets (in addition to having thinly traded securities), the Commission believes that the proposed two-prong exception (i.e., based on a security's ADTV value and the issuer's total assets and unaffiliated shareholders equity), should help to ensure that the Rule's policy goal—of deterring broker-dealers from commencing quotations for quoted OTC securities that may facilitate a fraudulent or manipulative scheme—is not undermined.[124]

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[124] See, e.g., Andreas Hackethal et al., Who Falls Prey to the Wolf of Wall Street? Investor Participation in Market Manipulation (ECGI, Working Paper No. 446, 2019), available at https://ecgi.global/sites/default/files/working_papers/documents/finalleuzmeyermuhnsolteshackethal.pdf (stating that in "pump-and-dump" schemes, promoters often target thinly traded "penny" stocks for which limited liquidity leads to fast price increases when demand rises); see also Michael Hanke & Florian Hauser, On the effects of stock spam e-mails, 11 J. Fin. Mkts. 57, 60 (2008).

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q60. How would market participants generally calculate ADTV value for the purposes of this exception? What data sources would they use, and what is the reliability and availability of these data sources? Please be specific. Is ADTV value an appropriate measure to use in the context of measuring a security's susceptibility to fraudulent or manipulative practices? Why or why not?

Q61. Should proposed paragraph (f)(5) include an additional requirement that the security that is the subject of the publication or submission of a quotation meet a certain minimum bid price? Why or why not? For such a requirement, what would be the appropriate minimum bid price?

Q62. Should the proposed exception's ADTV test prong, contained in proposed paragraph (f)(5)(i)(A), also include the ADTV value of convertible securities where the underlying security satisfies the proposed ADTV threshold? If so, commenters should explain their rationale. Should the proposed exception's ADTV test prong, contained in proposed paragraph (f)(5)(i)(A), exclude trading volume outside the U.S.? Please explain.

Q63. Should the dollar value of the ADTV test prong of the proposed exception be higher than $100,000 (e.g., $500,000 or $1 million), or should it be a lower amount (e.g., $50,000)? Commenters should specify what the dollar value should be and provide any relevant data or analysis to support their response. If the proposed exception's ADTV test prong were adopted, should it be adjusted for inflation going forward? If yes, how often? Please explain.

Q64. Should the proposed ADTV test measuring period be longer than 60 calendar days (e.g., six months) or shorter (e.g., 30 days)? Should the length of the measuring period

depend on the amount of the value of ADTV threshold (i.e., should a higher dollar value of ADTV threshold be allowed but require a shorter measuring period)? Would a shorter measuring period (e.g., 30 days) be less effective in measuring a security's susceptibility to fraudulent or manipulative practices? Why or why not?

Q65. To meet the proposed exception, a broker-dealer would need to determine the value of a security's worldwide ADTV by doing a daily calculation over a 60-calendar-day measuring period. Should this calculation be less frequent? For example, should the proposed exception be modified to require a calculation done once a month? Would this alternative ADTV measuring standard be significantly less burdensome? Would this alternative ADTV measuring standard be as effective as a daily calculation over a longer period in determining which securities are less likely to be the subject of a Commission-ordered trading suspension or involved in manipulative conduct in the OTC market? Please explain.

Q66. Because a broker-dealer generally would be able to determine the value of a security's worldwide ADTV from information that is publicly available and that the broker-dealer has a reasonable basis for believing is reliable, as discussed above, should the proposed exception in paragraph (f)(5) be modified so as not to include the proviso that would limit the availability of the exception to those quoted OTC securities where proposed paragraph (b) information is current and publicly available? Would including the proviso render the exception less effective in focusing the proposed Rule on the more thinly traded microcap securities that are more likely to be involved in manipulative conduct in the OTC market? Why or why not?

Q67. Rule 101 of Regulation M includes an exception from the trading prohibitions in Regulation M for "actively-traded" securities (i.e., securities with a value of ADTV of $1 million or more, using a two-full calendar month measuring period, if the issuer has a public float value

of at least $150 million). As an alternative, should the Commission propose an ADTV prong of the exception in proposed paragraph (f)(5)(i)(A) to parallel the $1 million ADTV threshold of Regulation M's actively-traded securities exception? Please explain.

Q68. If a quoted OTC security ceases to meet the requirements of either of the proposed ADTV test or the assets test, and if a broker-dealer may not rely on the piggyback exception, should the proposed exception continue for a period of time, such as 10 business days, to allow for a broker-dealer to review the required issuer information?

Q69. Should the threshold amount for the unaffiliated shareholders' equity test be higher than $10 million (e.g., $20 million)? If so, please explain. Are there circumstances under which it may be appropriate to permit a lower threshold amount? If so, please explain.

Q70. Should the exception in proposed paragraph (f)(5)(i)(B) be modified to include a public float value test, similar to that contained in Regulation M, instead of the combined asset test proposed? If so, should the public float value use Regulation M's $25 million threshold (for "actively-traded" securities) or some higher or lower amount? Would public float information be easy or difficult to obtain for broker-dealers trying to rely on this proposed exception?

Q71. Should the unaffiliated shareholders' equity test accommodate equity that is owned by shareholders that are affiliated with the issuer? Please explain why or why not. Would including equity that is owned by shareholders that are affiliated with the issuer increase the likelihood of the exception being misused or applied in cases where there may be a greater potential for fraudulent and manipulative conduct? In making the proposed unaffiliated shareholders' equity calculation, how difficult or burdensome would it be to identify equity that is owned by shareholders that are affiliated with the issuer? Please explain.

Q72. Would a balance sheet, particularly a balance sheet for a catch-all issuer, contain

sufficient information to permit broker-dealers to make the proposed unaffiliated shareholders' equity calculation?

Q73. Should the use of balance sheets of an exempt foreign private issuer be limited to balance sheets prepared in accordance with U.S. generally accepted accounting principles ("GAAP")?

Q74. Should the exception in proposed paragraph (f)(5)(i)(B) be available to securities that may satisfy the ADTV test, but where the issuer of the security is a domestic issuer, that is not a prospectus issuer, Reg. A issuer, or a reporting issuer and there are no publicly available U.S. GAAP financials (i.e., for purposes of meeting the proposed assets test in proposed paragraph (f)(5)(i)(B))? Please explain why or why not.

Q75. The Commission acknowledges that an exception conditioned on certain value thresholds could induce arbitrage for accounting purposes. Should the use of balance sheets of an exempt foreign private issuer that are not prepared in accordance with U.S. GAAP be limited to balance sheets prepared in accordance with the International Financial Reporting Standards ("IFRS") issued by the International Accounting Standards Board ("IASB" or "IFRS-IASB")? Is there a way to ensure that a broker-dealer does not "cherry pick" from accounting standards to take only the most beneficial figures from what is available so that the broker-dealer can rely on an exception conditioned on an asset test?

Q76. In evaluating foreign currency balance sheets, should the Commission modify the proposed assets prong of the exception in proposed paragraph (f)(5)(i)(B) to specify whether the equity balance is to be measured using today's current exchange rates or the rates in effect at the balance sheet date? Please explain why or why not. Commenters are requested to please also explain in their response whether it is more appropriate to use rates based on balance sheet date,

or date of quotation publication.

Q77. For 20-F issuers filing IFRS-IASB or balance sheets under another standard that are reconciled to U.S. GAAP, should the proposed asset test in proposed paragraph (f)(5)(i)(B) be modified to specify whether the home country numbers or the reconciled numbers may be used for purposes of determining eligibility under the proposed exception? Please explain. If not, why not?

Q78. Alternatively, for those issuers not using IFRS-IASB but that have to reconcile to U.S. GAAP, should the asset test in proposed paragraph (f)(5)(i)(B) be modified to require such issuers to use the reconciled number for purposes of determining eligibility under the proposed exception? Please explain why or why not.

Q79. With respect to issuers that are not prospectus issuers or reporting issuers, for purposes of determining whether such issuers would meet the requirements of the proposed assets and the unaffiliated shareholders' equity prongs in proposed paragraph (f)(5)(i)(B) of the exception, should the Commission specify that the audit of the balance sheet may be performed in accordance with either the auditing standards applicable to such issuers (e.g., the standards of the American Institute of Certified Public Accountants ("AICPA") for domestic issuers or applicable home country standards, which may be the standards of the International Auditing and Assurance Standards Board for a foreign issuer) or the standards of the Public Company Accounting Oversight Board? Please explain why or why not.

Q80. With respect to issuers that are not prospectus issuers or reporting issuers, should the independence requirements of Rule 2-01 of Regulation S-X apply to the exception in proposed paragraph (f)(5)(i)(B)? For example, if a certain issuer is currently only required to obtain an audit that is subject to the audit and independence standards of the American Institute

of Certified Public Accountants, should "independent" for purposes of this proposed exception also be determined by the AICPA's independence standards (i.e., not Rule 2-01)? Please explain why or why not. Commenters should include in their response whether the proposed exception should explicitly require the auditor's report, in particular, to be publicly available.

Q81. Should reliance on the exception be limited to those quoted OTC securities that satisfy the requirements of just one instead of both prongs of the proposed exception? Please explain why or why not. Are there alternative tests that should be considered? If so, please explain.

Q82. Should the exception be unavailable for securities of reporting issuers that are delinquent in their reporting obligations?

2. Underwritten Offerings

The proposal would add an exception to the Rule to allow a broker-dealer to publish a quotation of a security, without conducting the required information review, for an issuer with an offering that was underwritten by that broker-dealer. This proposal may potentially expedite the availability of securities to retail investors in the OTC market following an underwritten offering, which may facilitate capital formation.

Broker-dealers that act as underwriters in registered offerings or offerings conducted pursuant to Regulation A are subject to potential liability for misstatements and omissions in the related prospectus or offering circular. In a registered offering, they are subject to potential liability under Section 11 of the Securities Act for untrue statements of material facts or omissions of material facts required to be included in a registration statement or necessary to make the statements in the registration statement not misleading at the time the registration statement became effective. In registered offerings and Regulation A offerings, they are subject

to potential liability under Section 12(a)(2) of the Securities Act for any prospectus or oral communication that includes an untrue statement of material fact or omits to state a material fact that makes the statements made, based on the circumstances under which they were made, not misleading.

Because of the liability attached to underwriting activity, an underwriter typically conducts a due diligence review to mitigate potential liability associated with underwriting an offering of securities. Depending on its breadth and quality, this review may permit an underwriter to assert a defense to liability under Section 11 or Section 12(a)(2).[125] As a result, underwriters of registered and Regulation A offerings are incentivized to confirm that the information provided to investors in the prospectus for a registered offering and offering circular for a Regulation A offering is materially accurate and obtained from reliable sources.

Proposed Rule 15c2-11(a)(1) would prohibit the publication or submission for publication of a quotation unless (1) the broker-dealer has in its records the required proposed paragraph (b) information; (2) the proposed paragraph (b) information is current and publicly available; and (3) based on a review of the proposed paragraph (b) information and any other documents and information required by proposed paragraph (c), the broker-dealer has a reasonable basis under the circumstances for believing that the proposed paragraph (b) information is accurate in all material respects and that the sources of the proposed paragraph (b) information are reliable.

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[125] Securities Act Section 11(b) provides a defense from liability to an underwriter, with respect to non-expertized portions of the registration statement, only if the underwriter "had, after reasonable investigation, reasonable ground to believe and did believe . . . that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading." Securities Act Section 11(b). Under Section 12(a)(2), an underwriter may claim a defense if the underwriter "sustain[s] the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission." Securities Act Section 12(a)(2).

With respect to quotations published or submitted less than 90 calendar days following effectiveness of a registration statement for a registered offering or less than 40 calendar days following qualification of the offering statement for offerings conducted pursuant to Regulation A, the required proposed paragraph (b) information would consist of the final prospectus for the registered offering or the offering circular for the Regulation A offering. Underwriters of such offerings would typically have in their records the final prospectus or offering circular, which would also be publicly available on the Commission's EDGAR system. In addition, given the liability underwriters assume under Section 12(a)(2) and, for registered offerings, Section 11, the Commission believes they would likely have a reasonable basis for believing, particularly for a limited period of time following effectiveness of the registration statement or qualification of the related Form 1-A, that the prospectus or offering circular is accurate in all material respects and that the sources of that information are reliable.

Thus, the Commission is proposing to add proposed paragraph (f)(6), which would except the publication or submission of a quotation concerning a security by a broker-dealer that is named as an underwriter in a registration statement for an offering of that class of security referenced in proposed paragraph (b)(1) of the Rule or in an offering circular for an offering of that class of security referenced in proposed paragraph (b)(2) of the Rule.[126] The proposed exception would also include a proviso that states that the exception would apply only to the publication or submission of quotations concerning a class of security included in the registered

[126] See Proposed Rule 15c2-11(f)(6). The Commission is not proposing that the exception in proposed paragraph (f)(6) alter or create an exception to Regulation M.

or Regulation A offering within the time frames identified in proposed paragraphs (b)(1) or (b)(2).[127]

Because of a broker-dealer's involvement in the registered or Regulation A offering, including their assumption of liability for misstatements or omissions in the prospectus or offering circular and public availability of the proposed paragraph (b) information on EDGAR, the Commission believes that a subsequent information review requirement would be redundant and, thus, unnecessary. The public availability of the proposed paragraph (b) information is consistent with the policy goals of the Rule in addressing the heightened potential for fraudulent and manipulative conduct involving securities of little or lesser-known issuers or for which information is not publicly available.

Accordingly, the Commission believes that the proposed underwriter exception is appropriate and would provide comparable—if not greater—protections to investors as the review conducted by broker-dealers under Rule 15c2-11. While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q83. Are the liability standards and professional obligations of underwriters in registered and Regulation A offerings a sufficient basis for providing the proposed exception? Please explain.

Q84. An underwriter in a Regulation A offering is subject to a different liability standard than an underwriter in an offering registered under the Securities Act (i.e., Section 12(a)(2) applies for a Regulation A offering, while Section 11 imposes strict liability in a

[127] While the proposed exception in proposed paragraph (f)(6) would operate to except publications of quotations concerning these securities from the Rule's application entirely, the proposed proviso would clarify that reliance on the exception is only permitted for a limited period of time following effectiveness of the registration statement or qualification of the Regulation A offering statement.

registered offering). In view of the different liability standards, the Commission seeks comment on whether it is appropriate to provide this exception in connection with securities issued in Regulation A offerings.

Q85. Should underwritten shelf offerings also be included in the exception for publications or submissions of quotations for securities issued in underwritten offerings, even though it is possible that the shelf takedown could occur up to three years after the effectiveness of the shelf registration statement? Please explain why underwritten shelf registration statements should be included in the exception or excluded from the exception.

Q86. Are there other categories of issuers or potentially other categories of securities, not otherwise discussed in this release, that are unlikely to be involved in fraud in the OTC market for which publications or submissions of quotations of their securities also should be excepted from the Rule's provisions? Please explain.

Q87. Are there publications or submissions of quotations for other securities (e.g., debt securities, non-participatory preferred stock, or investment grade asset-backed securities) that have characteristics similar to those of the securities set forth above that should also be excepted from the Rule's provisions? If so, please explain.

3. Qualified IDQS Complies with the Information Review Requirement

The Commission is proposing to add an exception to the Rule that would except a broker-dealer from conducting the information review if a regulated third party conducts such review. This should increase the number of securities that are available to be quoted in the OTC market, providing retail investors with greater choices of securities in which to invest. The exception also may facilitate capital formation by reducing burdens on broker-dealers that are able to begin a quoted market in reliance on the exception.

In particular, the Commission is proposing to add a new exception in which a qualified IDQS may undertake to comply with the Rule's information review requirement and broker-dealers may rely on the review performed by the qualified IDQS.[128] The proposed exception is intended to reduce burdens on broker-dealers while maintaining an appropriate level of investor protection. Specifically, proposed paragraph (f)(7) would except from the Rule's information review requirement a broker-dealer that publishes or submits a quotation in a qualified IDQS where the qualified IDQS complies with the information review requirement and also makes a publicly available determination of such compliance with the information review requirement.[129]

To rely on the proposed exception, a broker-dealer would need to commence a quoted market by publishing or submitting a quotation within three business days after the qualified IDQS makes its determination (of compliance) publicly available.[130] The window of three business days is designed to help ensure that there are a limited number of days between the information review conducted by the qualified IDQS and the first quotation by a broker-dealer in reliance on this proposed new exception.[131] The three-business-day window also is designed to provide certainty to a qualified IDQS regarding the timing of its obligation to review additional current reports, such as Forms 8-K and Forms 1-U. Under the proposal, a qualified IDQS would not need to review current reports filed after the qualified IDQS publishes its determination that

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128 See Proposed Rule 15c2-11(f)(7).

129 Id.

130 Id.

131 See Proposed Rule 15c2-11(b)(3)(i) through (iii). This three-business-day period establishes a similar limitation to the requirement that a broker-dealer review current reports of an issuer, such as a Form 8-K for a reporting issuer or Form 1-U for a Reg. A issuer, that have been filed with the Commission three business days before the publication or submission of a quotation under the proposed amendments to the Rule. See supra Part III.A.2.d.

it complied with the information review requirement. The three-business-day window is also designed to encourage the commencement of a quoted market close in time following a qualified IDQS's information review and publicly available determination of the qualified IDQS's compliance with the review requirement.

The proposed exception, however, would not be available if the issuer of the security to be quoted is a shell company, or 30 calendar days after a broker-dealer first publishes or submits such quotation, in the qualified IDQS, in reliance on this paragraph (f)(7).[132]

The Commission does not believe that it would advance the Rule's purpose to allow broker-dealers to rely on this exception to publish or submit quotations for securities of shell companies or to rely on the exception indefinitely. The Commission believes that limiting the availability of the exception is appropriate where there is an increased risk for potential fraud and manipulation.[133]

As discussed above, proposed paragraph (a)(2) would set forth the review requirement for a qualified IDQS to be able to make known to others the quotation of a broker-dealer that publishes or submits a quotation for a security. Thus, once the qualified IDQS has complied with the Rule's information review requirement and made a publicly available determination that the requirements of the proposed paragraph (f)(7) exception are met, any broker-dealer would be able to publish or submit quotations for the security without any delay. In other words, unlike the 30-day timing requirement under the piggyback exception, there would be no delay for this exception to apply, such that a broker-dealer would be able to rely on the exception immediately.

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132 See Proposed Rule 15c2-11(f)(7)(i) through (ii).

133 See, e.g., Douglas Cumming et al., Financial market misconduct and agency conflicts: A synthesis and future directions, 34 J. Corp. Fin. 150 (2015).

Moreover, broker-dealers would only be able to rely on the exception in proposed paragraph (f)(7) during the 30 calendar days after the first quotation is submitted or published under proposed paragraph (f)(7). The Commission believes that 30 calendar days should provide sufficient time for broker-dealers to publish or submit quotations in order to establish the frequency of quotations that would be required for them to be able rely on the piggyback exception (30 calendar days with no more than four business days in succession without a quotation). As discussed above, the exception in proposed paragraph (f)(7) is not available for shell companies. Additionally, a qualified IDQS would not be able to complete the required review if proposed paragraph (b) information were not current and publicly available.[134] Accordingly, when a broker-dealer is no longer able to rely on the exception in proposed paragraph (f)(7) and may begin to rely on the piggyback exception, the broker-dealer will not have to determine if the issuer is a shell company or if there is current and publicly available proposed paragraph (b) information. If, however, the security has been the subject of a trading suspension pursuant to Section 12(k) of the Exchange Act, a broker-dealer might not be able to rely on the piggyback exception. In such case, 30 calendar days may not be sufficient to establish broker-dealer reliance on the piggyback exception.

If, however, after 30 days, broker-dealers have not begun to publish or submit quotations on a continuous basis, there could be a break in quotations that would prevent broker-dealers from then being able to rely on the piggyback exception.[135] Should such a break in quotations occur, the qualified IDQS would be required to comply with the Rule's information review

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134 See Proposed Rule 15c2-11(a)(2)(ii).

135 See Proposed Rule 15c2-11(f)(3)(i)(A) and (B).

requirement before broker-dealers would be able to publish or submit quotations pursuant to this proposed exception.[136]

Similar to the other two new proposed exceptions (i.e., the ADTV/asset test and underwriter exceptions), the proposed exception is intended to provide an initial "on ramp" for certain securities to be quoted in the OTC market that are able to meet the requirements of the exception. The proposed exception recognizes that, currently, certain IDQSs meet the definition of an ATS and operate pursuant to the exemption from the definition of an "exchange" under Rule 3a1-1(a)(2) of the Exchange Act.[137] The proposed exception would allow these qualified IDQSs (and any future qualified IDQS) to play a greater role in the Rule 15c2-11 compliance process by allowing broker-dealers to rely on a qualified IDQS's review of the required information of issuers of certain securities that are less likely to be targeted for fraudulent activity (e.g., securities of large cap foreign issuers).

The Commission believes that by providing this initial on ramp, broker-dealers will have the flexibility to rely on a qualified IDQS in complying with the Rule's provisions. The proposed exception is designed to reduce burdens on broker-dealers without undermining investor protections under the Rule.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

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136 See id.

137 See infra notes 160–162 and accompanying text. As discussed in greater detail in Part III.H.4 infra, the Commission believes that limiting the Rule to qualified IDQSs, which are required to be regulated as ATSs (which are registered broker-dealers), would allow for greater Commission oversight because non-ATS IDQSs may not be required to be registered with the Commission.

Q88. How, and to what extent, would the proposed exception appropriately protect investors? Please explain.

Q89. How, and to what extent, would the limitation of the proposed exception regarding shell companies appropriately (or unduly) limit the application of the exception? Should broker-dealers also be permitted under the exception to rely on qualified IDQSs to comply with the Rule's requirements when publishing or submitting quotations for securities of shell companies? Please explain.

Q90. Should broker-dealers also be permitted under the exception to rely on qualified IDQSs to comply with the Rule's requirements when publishing or submitting quotations for securities of blank check companies? If so, what would be an appropriate definition for "blank check company" in this circumstance? Please explain.

Q91. The Commission seeks specific comment on whether the 30-calendar-day restriction in proposed paragraph (f)(7)(ii) is appropriate or, if not, how it should be modified. The Commission seeks specific comment on whether the three-business-day window is appropriate or, if not, how should it be modified.

Q92. Should broker-dealers be able to rely upon any entities other than qualified IDQSs to perform the Rule's information review requirement? Please explain.

Q93. Should the proposed exception under proposed paragraph (f)(7) limit broker-dealers to only publishing or submitting quotations in the qualified IDQS that makes the publicly available determination that the requirements of an exception are met? Please explain. Would having only regulated entities that meet the definition of a "qualified IDQS" create an unfair competitive disadvantage in the OTC market? Why or why not?

Q94. Should the Commission place additional limitations on the proposed exception's availability, such as prohibiting application of the proposed exception to quotations for a security that is a penny stock? If so, please explain why such limitation would be appropriate.

Q95. Please discuss potential benefits or disadvantages to investors or other market participants if a qualified IDQS undertakes to perform the information review requirement. Please discuss whether and how any such benefits or disadvantages change if one qualified IDQS undertakes such action or if multiple qualified IDQSs undertake such action. Would having a regulated third party conduct the required review increase the number of OTC securities that could be quoted in the OTC market? In what way, if any, would this benefit investors, particularly retail investors? Please explain.

F. Proposed New Exception for Relying on Determinations by a Qualified IDQS or a Registered National Securities Association

The Commission is proposing to allow broker-dealers to rely on determinations by regulated third parties that certain exceptions are available for a security or an issuer. This proposal is designed to make it easier for broker-dealers to maintain a market in securities, while at the same time providing the benefits that would result from such third party determinations, thereby providing retail investors with greater opportunity to buy and sell securities.

The Commission is proposing to amend the Rule by adding a new exception in proposed paragraph (f)(8) to allow a broker-dealer to rely on publicly available determinations by a qualified IDQS or a registered national securities association that (1) proposed paragraph (b) information is current and publicly available or (2) that a broker-dealer may rely on an exception contained in proposed paragraphs (f)(1), (f)(3)(i)(A), (f)(3)(i)(B), (f)(4), (f)(5), or (f)(7). Thus, for example, new proposed paragraph (f)(8) would permit broker-dealers to rely on a publicly

available determination by a qualified IDQS or a registered national securities association that an issuer's proposed paragraph (b) information is current and publicly available for purposes of a proposed exception to the Rule, such as the piggyback exception or the unsolicited quotation exception. In this circumstance, to facilitate a broker-dealer's reliance, the qualified IDQS or registered national securities association must represent in a publicly available determination that it has reasonably designed written policies and procedures to determine whether proposed paragraph (b) information is current and publicly available, and that the conditions of an exception under proposed paragraph (f) are met.

The Commission anticipates that broker-dealers may encounter some additional costs in determining whether an exception would apply to the publication or submission of a quotation for an OTC security. For example, while there are certain situations in which a broker-dealer can readily know whether an exception applies (e.g., exchange traded securities under proposed paragraph (f)(1)), there are other circumstances in which a broker-dealer could be required to use additional resources to determine whether an exception to the proposed Rule applies (e.g., whether the issuer meets the $10 million unaffiliated shareholder equity threshold under proposed paragraph (f)(5)(i)(B) or whether the broker-dealer can rely on the piggyback exception under proposed paragraphs (f)(3)(i)(A) and (B)). Proposed paragraph (f)(8) is intended to mitigate such costs and burdens by allowing broker-dealers to rely on the determinations of certain appropriate third parties.

The Commission believes that allowing broker-dealers to rely on a publicly available determination by a qualified IDQS that a broker-dealer may rely on an exception to the Rule strikes an appropriate balance between mitigating costs to broker-dealers in complying with the proposed Rule's provisions and promoting investor protection. In particular, a qualified IDQS

should have an interest in facilitating a fair and efficient market to encourage more activity on such IDQS. The Commission does, however, recognize that profit motives might create an incentive for a qualified IDQS to make a determination that an exception applies to a particular publication or submission of a quotation for a security even when the determination is not appropriate, assuming that the IDQS would collect fees associated with quoting activity or transactions that occur after it makes the exception determination. In complying with the requirements of Regulation ATS, a qualified IDQS (which would be required to be an ATS) would have notice and reporting requirements, which would contribute to the Commission's ability to effectively oversee and effectively examine qualified IDQSs.[138]

Similarly, the Commission believes that allowing broker-dealers to rely on a registered national securities association's determination that a broker-dealer may rely on an exception to the proposed Rule strikes an appropriate balance between mitigating costs to broker-dealers in complying with the Rule's provisions and promoting investor protection. A registered national securities association has obligations under Section 19 of the Exchange Act "to comply with provisions of the [Exchange Act], the rules and regulations thereunder, and its own rules, and . . . absent reasonable justification or excuse enforce compliance . . . with such provisions."[139] Additionally, a registered national securities association is subject to inspections by the Commission, which contributes to the Commission's ability to effectively oversee a registered national securities association.

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138 See infra Part III.H.4.

139 See Exchange Act Section 19(g).

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q96. Should a broker-dealer's reliance be limited to a determination by a registered national securities association and not a qualified IDQS? Why or why not? Should a broker-dealer's reliance be limited to a determination by a qualified IDQS and not a registered national securities association? Why or why not?

Q97. Are there concerns that would discourage a qualified IDQS from undertaking to comply with the proposed Rule's information review requirement? Please explain. If so, please describe how such concerns could be addressed.

Q98. Should proposed paragraph (f)(8) be expanded to allow broker-dealers to rely on publicly available determinations by entities other than qualified IDQSs or registered national securities associations? If so, what entities should be added to proposed paragraph (f)(8) and why?

Q99. How, and to what extent, do the proposed Rule's requirements that a qualified IDQS make a publicly available determination that it has reasonably designed written supervisory procedures, in conjunction with the Commission's oversight of the qualified IDQS as an ATS, appropriately mitigate the conflicts of interest that might arise based on a qualified IDQS's profit motives? If not, how should the Commission address such conflicts of interests?

Q100. How, and to what extent, would the exception in proposed paragraph (f)(8) impact liquidity for quoted OTC securities?

Q101. Should certain exceptions enumerated in proposed paragraph (f)(8) be removed from the paragraph? If so, which ones and why? Should certain exceptions not enumerated in proposed paragraph (f)(8) be added to the paragraph? If so, which ones and why?

G. Proposed Amendments to the Recordkeeping Requirement

1. Existing Recordkeeping Requirement

Currently, the Rule requires broker-dealers to preserve the documents and information required under paragraphs (a) and (b) of the Rule for a period of not less than three years, the first two years in an easily accessible place.[140] Because under the existing Rule a broker-dealer may not rely on a qualified IDQS's information review, as would be permitted pursuant to proposed paragraph (a)(2), the existing Rule does not include a recordkeeping requirement for qualified IDQSs that make known to others the quotation of a broker-dealer. Additionally, the existing Rule does not require that broker-dealers, qualified IDQSs, and registered national securities associations maintain documents and information that support reliance on an exception to the Rule.

2. Proposed Amendments to the Recordkeeping Requirement

The Commission is proposing that market participants keep certain records that support their information review or reliance on an exception. Providing the Commission with information to oversee this market would assist in maintaining the integrity of the OTC market.

a) Recordkeeping Requirement upon Publication or Submission of Quotations

Proposed paragraph (d)(1)(i)(A) would require broker-dealers that comply with the review requirement of proposed paragraph (a)(1) to preserve for a period of not less than three years, the first two years in an easily accessible place, the documents and information that are required under proposed paragraphs (a), (b) and (c) of the Rule.[141] In addition, proposed

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140 Exchange Act Rule 15c2-11(c).

141 See Proposed Rule 15c2-11(d)(1).

paragraph (d)(1)(i)(B) would require any qualified IDQS that makes known to others the quotation of a broker-dealer pursuant to proposed paragraph (a)(2) to preserve for a period of not less than three years, the first two years in an easily accessible place, the documents and information that are required under proposed paragraphs (a), (b) and (c) of the Rule.[142]

The proposed recordkeeping requirement tracks the text of paragraph (c) of the existing Rule but adds a recordkeeping requirement for any qualified IDQSs that make known to others the quotation of a broker-dealer pursuant to proposed paragraph (a)(2). The Commission is adding this recordkeeping requirement to make clear that a qualified IDQS that makes known to others the quotation of a broker-dealer pursuant to proposed paragraph (a)(2) has the same recordkeeping requirement as a broker-dealer that complies with the information review requirement in proposed paragraph (a)(1).

If a broker-dealer or qualified IDQS obtains and reviews proposed paragraph (b) information that is available on EDGAR, the broker-dealer or qualified IDQS will not be required to preserve that information. The broker-dealer or qualified IDQS need only document the proposed paragraph (b) information that it reviewed. The Commission does not believe that it is necessary to require broker-dealers or qualified IDQSs to preserve records that are available on EDGAR because doing so would create redundant recordkeeping obligations.

b) Recordkeeping Requirement for Relying on an Exception

Although the existing Rule does not contain a recordkeeping requirement for a broker-dealer that relies on an exception to the Rule, the Commission believes that most broker-dealers maintain records of their reliance on a particular exception to the Rule. There have been

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142 See id.

instances during examinations, however, where broker-dealers have not had records regarding the basis of their reliance on an exception to the existing Rule. The proposed recordkeeping requirement is intended to aid the Commission in its oversight of brokers-dealers that rely on exceptions to the Rule by requiring them to make, retain, and keep current records that support their reliance on that exception. Accordingly, any broker-dealer that relies on an exception to publish or submit a quotation would be required to preserve for a period of not less than three years, the first two years in an easily accessible place, the documents and information that demonstrate that the requirements of the relevant exception are met.

Further, as discussed above, the Commission is proposing to add the exception contained in proposed paragraph (f)(8), which would allow broker-dealers to publish or submit quotations for a security in reliance upon the publicly available determination of a qualified IDQS or a registered national securities association that the requirements of certain exceptions are met.[143] Proposed paragraph (f)(8) also would permit a broker-dealer to rely on publicly available determinations by a qualified IDQS or registered national securities association that proposed paragraph (b) information is current and publicly available. If a qualified IDQS or a registered national securities association makes such a determination pursuant to proposed paragraph (f)(8), it would need to preserve for a period of not less than three years, the first two years in an easily accessible place, the documents and information that demonstrate that the requirements of certain exceptions are met.[144]

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143 See supra Part III.F.

144 See Proposed Rule 15c2-11(d)(2). The Commission acknowledges that the proposed recordkeeping requirement is shorter than the current five year retention period under Exchange Act Rule 17a-1(b) for a registered national securities association. The Commission, however, believes that it is appropriate for purposes of Rule 15c2-

A broker-dealer that relies on a determination pursuant to proposed paragraph (f)(7) by a qualified IDQS or proposed paragraph (f)(8) by a qualified IDQS or a registered national securities association, however, is required only to document the exception upon which the broker-dealer is relying and the name of the qualified IDQS or registered national securities association that determined that the requirements of that exception are met.[145] In such circumstance, the Commission believes that it is appropriate to limit the records that a broker-dealer must make and keep because the qualified IDQS or registered national securities association would have an independent recordkeeping obligation regarding its determination that the requirements of an exception are met. The Commission, therefore, would be able to obtain documents supporting such determinations directly from the qualified IDQS or registered national securities association.

The proposed amendments do not require a broker-dealer to retain records supporting that every condition of an exception is met each time the broker-dealer publishes or submits a quotation. The various requirements of each exception likely would involve different types of records that would need to be created to establish reliance on an exception. However, many of these records may not need to be created every time a broker-dealer publishes or submits a quotation relying on an exception.[146]

For example, making and keeping records to support reliance on one prong of an exception (e.g., whether the asset test prong under the proposed paragraph (f)(5) exception is met

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(footnote continued)
11 to align the recordkeeping requirement for all participants in the OTC market to avoid creating different requirements for market participants engaged in the same activity.

145 See id.

146 See infra Part VII.C.2.

by retaining an electronic copy of the audited balance sheet) would require the creation and retention of a record once every year, whereas making and keeping current records of reliance on another part of the same exception (e.g., whether the ADTV test prong under proposed paragraph (f)(5) is met by retaining a screen shot of a website that demonstrates the ADTV value over the 60-calendar-day period on the day the quotation was published) would require a record to be created every trading day. Rather than specifically directing that market participants would need to document every condition of the basis of their reliance on an exception for each quotation, the proposed Rule would instead require broker-dealers, qualified IDQSs, and registered national securities associations to preserve documents and information "that demonstrate that the requirements for an exception under paragraph (f)" are met. Broker-dealers should consider facts and circumstances, such as the nature of their business as it relates to the particular paragraph or exception to the proposed Rule, in determining when and how they should create records to support reliance on an exception, and the content of such records.

Additionally, a broker-dealer, qualified IDQS, or registered national securities association would not need to preserve records under proposed paragraph (d)(2) for reliance on exceptions under proposed paragraphs (f)(1) or (f)(4). These exceptions can be demonstrated without the need for a broker-dealer, qualified IDQS, or registered national securities association to preserve a separate record. With respect to proposed paragraph (f)(1), whether or not a security is traded on an exchange and thus subject to the proposed paragraph (f)(1) exception is widely known. Additionally, whether or not a security is a municipal security for purposes of reliance on the municipal securities exception in proposed paragraph (f)(4) is also widely known. Proposed paragraph (d)(2)(ii) would also include a proviso such that a broker-dealer, qualified IDQS, or

registered national securities association would not be required to preserve records under proposed paragraph (d)(2) if such records are available on EDGAR.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q102. What, if any, impact would the recordkeeping requirement have on liquidity in the secondary market for quoted OTC securities?

Q103. Is the preservation of records required by proposed paragraph (d) for a period of three years appropriate? If not, how long should the period be under proposed paragraph (d) to preserve records under proposed paragraph (a), (b), and (c) and why? Should proposed paragraph (d)(1) contain requirements specifying when the record preservation period begins for the records required to be preserved in proposed paragraph (d)? What are broker-dealers' current practices for deciding when to begin preserving the records required to be preserved under the existing rule? Would these practices need to be modified to comply with proposed paragraph (d)(1)? Is a recordkeeping requirement necessary, or will broker-dealers maintain the records of their own accord or pursuant to other regulatory recordkeeping obligations?

Q104. Are the preservation requirements regarding proposed paragraph (b) information and proposed paragraph (c) supplemental information under proposed paragraph (d)(1) unduly burdensome on broker-dealers or qualified IDQSs or overly costly? If so, in what ways could the proposed Rule reduce these burdens and costs? What are the costs to a broker-dealer to preserve proposed paragraph (b) information?

Q105. In addition to printing or electronically saving proposed paragraph (b) information and proposed paragraph (c) supplemental information, are there other ways that a broker-dealer or qualified IDQS would be able to document its review of proposed paragraph (b) information

and proposed paragraph (c) supplemental information, including whether such proposed paragraph (b) information is current and publicly available? If so, what methods or means could a broker-dealer or qualified IDQS implement to document compliance with the information review requirement under proposed paragraph (a)? Should a broker-dealer, qualified IDQS, or registered national securities association be able to preserve a memorandum or other document contemporaneous to the review showing that it performed a review, rather than the documents it reviewed (so long as there is not otherwise a requirement, such as a Commission or SRO rule, that the entity make and keep such documents)?

Q106. Should a broker-dealer or qualified IDQS be able to document its review of proposed paragraph (b) information that is publicly available on the website of an issuer, broker-dealer, registered national securities association, or qualified IDQS by recording the website where the broker-dealer or qualified IDQS obtained such information? If so, how would a broker-dealer know that such information would continue to be publicly available for the required recordkeeping retention period, even after the date at which the broker-dealer or qualified IDQS complied with the review under proposed paragraph (a)?

Q107. Should broker-dealers publishing or submitting quotations in reliance on proposed paragraphs (f)(7) and (f)(8) be required to document information in addition to the proposed required documentation (i.e. documenting the exception that the broker-dealer is relying upon and the name of the qualified IDQS or registered national securities association that made a determination that the conditions of the exception have been met)? If so, what additional documentation and information should a broker-dealer preserve to demonstrate its reliance on a determination pursuant to proposed paragraphs (f)(7) and (f)(8)?

Q108. Should proposed paragraph (d)(2) contain requirements enumerating the frequency of recordkeeping or any other specific measures? Should broker-dealers specifically be required to preserve documents and information pursuant to proposed paragraph (d)(2) on a quotation by quotation basis for purposes of the unsolicited quotation exception? Why or why not? If not, is there another alternative approach that could be used? Please identify any alternative approach and explain why it is preferable. For example, would the proposed recordkeeping requirement in proposed paragraph (d)(2) and the requirements of FINRA Rule 6432 be sufficient to help prevent misuse of the exception?[147] Please explain.

Q109. Are there certain exceptions under proposed paragraph (f) that should be included in the proviso and not be subject to the recordkeeping requirement in proposed paragraph (d)(2)? If so, which ones and why? Are there certain requirements concerning exceptions under proposed paragraph (f) that should be added to the proviso under proposed paragraph (d)(2)(ii)? If so, what additional requirements should be considered and what are the characteristics of such requirements that would warrant its inclusion in the proviso?

Q110. Taken together, would the proposed changes described above regarding proposed paragraph (f) go far enough to mitigate the potential for fraud and other abuses, including the

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[147] Supplemental Material .01 to FINRA Rule 6432 requires broker-dealers initiating or resuming quotations in reliance on the exception provided by Rule 15c2-11(f)(2) (i.e., the unsolicited quotation exception) to "be able to demonstrate eligibility for the exception by making a contemporaneous record of: (a) the identification of each associated person who receives the unsolicited customer order or indication of interest directly from the customer, if applicable; (b) the identity of the customer; (c) the date and time the unsolicited customer order or indication of interest was received; and (d) the terms of the unsolicited customer order or indication of interest that is the subject of the quotation (e.g., security name and symbol, size, side of the market, duration (if specified) and, if priced, the price). Any member displaying a quote representing an unsolicited customer order or indication of interest that was received from another broker-dealer must contemporaneously record the identity of the person from whom information regarding the unsolicited customer order or indication of interest was received, if applicable; the date and time the unsolicited customer order or indication of interest was received by the member displaying the quotation; and the terms of the order that is the subject of the quotation."

potential for broker-dealers' use of the piggyback exception to facilitate fraud and other abuses (whether intentional or inadvertent)? Are there other changes that the Commission should make to address the risk of fraud and abuse? For instance, should the piggyback exception be eliminated entirely? Please explain why or why not. How would elimination of the piggyback exception affect small issuers?

H. Proposed Amendments to the Rule's Definitions

In light of the amendments that the Commission is proposing today, as discussed above, the Commission is also proposing to add definitions of certain terms that are referenced throughout these amendments.

1. Current

The Commission proposes to define "current" as filed, published, or disclosed in accordance with the time frames identified in each of proposed paragraphs (b)(1) through (b)(5) of the Rule.[148] For example, with respect to prospectus issuer information, a copy of the issuer's prospectus that is specified by Section 10(a) of the Securities Act, other than a registration statement on Form F-6, would be current for purposes of proposed Rule 15c2-11 if the prospectus became effective less than 90 calendar days prior to the day on which a broker-dealer publishes or submits a quotation for a security of the prospectus issuer. With respect to Reg. A issuer information, the offering circular required by proposed paragraph (b)(2) would be current for purposes of proposed Rule 15c2-11 if the Reg. A issuer that filed a notification under Regulation A became authorized to commence its offering less than 40 calendar days prior to the day on which a broker-dealer publishes or submits a quotation for the issuer's security.

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[148] See Proposed Rule 15c2-11(e)(1).

Determining whether reporting issuer information is current for purposes of proposed Rule 15c2-11 would depend on the issuer's regulatory status and its obligation to file or publish information pursuant to a statutory or rule-based requirement under the federal securities laws (i.e., not pursuant to any of the Rule's provisions). For example, for a reporting issuer that files annual reports pursuant to Section 13 or 15(d) of the Exchange Act, the reporting issuer's information would be current if it were the issuer's most recent annual report and any periodic or current reports that the issuer has filed subsequent to that annual report. If that issuer has yet to file its first annual report, the registration statement that the issuer filed under the Securities Act or under Section 12 of the Exchange Act would be current if it became effective within the prior 16 months.

For a reporting issuer that files annual reports pursuant to Regulation A, the reporting issuer's information would be current if it were the issuer's most recent annual report and any periodic and current reports that the issuer has filed under Regulation A subsequent to that annual report. If the issuer has yet to file its first report, the offering circular that the issuer filed under Regulation A would be current if it were qualified within the prior 16 months.

For an insurance company that files an annual statement referred to in Section 12(g)(2)(G)(i) of the Exchange Act because it is required to file reports pursuant to Section 13 or 15(d) of the Exchange Act, the insurance company's information would be current if it were the issuer's annual statement and any periodic or current reports that the issuer has filed subsequent to that statement. If the insurance company has yet to file its first annual statement, the registration statement that the issuer filed under the Securities Act or Section 12 of the Exchange Act would be current if it became effective within the prior 16 months. Finally, information for an insurance company that is exempted from Section 12(g) of the Exchange Act would be

current if it were the issuer's annual statement referred to in Section 12(g)(2)(G)(i) of the Exchange Act.

Exempt foreign private issuer information (i.e., information that the issuer has published pursuant to Rule 12g3-2(b) under the Exchange Act) would be current for purposes of the proposed Rule if it were published since the beginning of the exempt foreign private issuer's last fiscal year. Catch-all issuer information would be current if it were dated within 12 months prior to the broker-dealer's publication or submission of a quotation for the catch-all issuer's security. The issuer's balance sheet would not be current if it were older than 16 months and did not include a profit and loss statement and retained earnings statement for 12 months preceding the date of the balance sheet.[149] If the balance sheet, however, were not as of a date within six months before the publication of the quotation, the balance sheet would need to be accompanied by a profit and loss statement, as well as a retained earnings statement, that are as of a date within six months before the publication of a quotation.[150]

This definition would provide clarity to market participants as to the time frames within which issuer information must be filed, published, or disclosed for the issuer's information to be current solely for purposes of broker-dealer and qualified IDQS compliance with proposed Rule 15c2-11. The proposed definition of "current" does not change the requirements of any issuer to file or publish information pursuant to a statutory or rule-based requirement under the Exchange Act or the Securities Act.

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149 See Proposed Rule 15c2-11(b)(5)(i)(L).

150 See supra Part III.A.2.e.

2. Shell Company

The Commission proposes to define "shell company" as any issuer, other than a business combination related shell company as defined in Rule 405 of Regulation C, or an asset-backed issuer as defined in Item 1101(b) of Regulation AB, that has (1) no or nominal operations and (2) either (i) no or nominal assets, (ii) assets consisting solely of cash and cash equivalents, or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets.[151] This definition of shell company closely tracks the definition of shell company in Rule 405 of Regulation C and in Rule 12b-2,[152] the provisions of which apply to registrants.[153] In addition, the proposed definition of shell company comports with the provisions of Rule 144(i)(1)(i)[154] regarding availability of that safe harbor for the resale of securities initially issued by certain issuers.[155]

The proposed definition of a shell company for purposes of Rule 15c2-11, however, is not limited to companies that have filed a registration statement or have an obligation to file reports under Section 13 or Section 15(d) of the Exchange Act. Rather, the proposed definition

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151 See Proposed Rule 15c2-11(e)(8).

152 Exchange Act Rule 12b-2.

153 "Registrant" is defined in Rule 405 as the issuer of the securities for which a registration statement is filed, and in Rule 12b-2 as an issuer of securities with respect to which a registration statement or report is to be filed.

154 Securities Act Rule 144(i)(1)(i).

155 Another difference between the definition of shell company in the proposed amendment to Rule 15c2-11(e)(8) and the definitions of shell company in Rules 405 and 12b-2 is that the proposed definition in Rule 15c2-11 does not include a note indicating how assets are determined for purposes of the definition as do Rules 405 and 12b-2. The proposed definition of a shell company for purposes of Rule 15c2-11 does not include such a note; Rules 405 and 12b-2 require U.S. GAAP compliance while Rule 15c2-11 does not. While the amendments to Rule 15c2-11 that the Commission is proposing are intended to provide, among other things, increased transparency of issuer information, the Rule does not address how issuers maintain their financial records. More specifically, the proposed amendments do not require U.S. GAAP compliance, and the proposed amendments would permit broker-dealers, qualified IDQSs, and registered national securities associations to determine whether an issuer is a shell company based on their review of the issuer's information.

of a shell company under Rule 15c2-11 would cover all issuers of securities because the provisions of Rule 15c2-11 apply to publications and submissions of quotations for securities of reporting issuers as well as catch-all issuers. Accordingly, the Commission is proposing a definition of a shell company for purposes of Rule 15c2-11 that applies more broadly, to a greater breadth of issuers, than do the definitions in Rule 405 of Regulation C and Rule 12b-2.

The Commission believes that the proposed definition of a shell company is appropriate in the context of Rule 15c2-11 because it would capture the breadth of issuers of quoted OTC securities. The Commission has stated that startup companies that have limited operating history do not meet the condition of having "no or nominal operations" for the purposes of the public resale of restricted and control securities, and the Commission also believes that this approach is appropriate in the context of broker-dealers determining whether a company fits within the meaning of "shell company" as defined in proposed paragraph (e)(8) when deciding whether they may rely on the piggyback exception.[156] Further, consistent with the definition of the term "shell company" in Rule 405 of Regulation C and Rule 12b-2, the Commission preliminarily believes that defining the term "nominal" with reference to quantitative thresholds would be unworkable in this context.[157]

3. Publicly Available

The Commission is proposing a definition of the term "publicly available" that is intended to be broad and to account for the ease with which investors or other market

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[156] See supra note 102.

[157] See Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies, Exchange Act Release No. 52038 (July 15, 2005), 70 FR 42234 (July 21, 2005); see also supra Part III.C.2.d (discussing how a determination of whether an issuer is a shell company is based on facts and circumstances).

participants can obtain issuer information. The Commission proposes to define the term "publicly available" to mean available on EDGAR or on the website of a qualified IDQS, a registered national securities association, the issuer, or a registered broker-dealer. Further, publicly available shall not mean where access to proposed paragraph (b) information is restricted by user name, password, fees, or other constraints; this language is included as a proviso to the definition of "publicly available."[158] The Commission believes that incorporating into the proposed definition of "publicly available" specific locations where regulated market participants must publish information would help investors and other market participants to locate the information. Additionally, the Commission believes that it is appropriate to include the issuer's website in the definition of publicly available because the issuer should be a reliable source for proposed paragraph (b) information.

4. Qualified Interdealer Quotation System

The Commission proposes to define the term "qualified interdealer quotation system" to mean any IDQS that meets the definition of an ATS as defined under Rule 300(a) of Regulation ATS and operates pursuant to the exemption from the definition of an "exchange" under Rule 3a1-1(a)(2) of the Exchange Act. Accordingly, the proposed definition would exclude any IDQS that is not an ATS (a "non-ATS IDQS").[159]

As proposed, the Rule would permit a qualified IDQS to comply with the information review requirement to determine if the requirements of an exception are met, allowing a broker-

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158 See Proposed Rule 15c2-11(e)(4).

159 See Proposed Rule 15c2-11(e)(5).

dealer to publish or submit quotations in reliance on that qualified IDQS's determination.[160] Since the Rule was last substantively amended in 1991, IDQSs have evolved to operate as marketplaces for bringing together the orders of multiple buyers and sellers of OTC securities in addition to regularly disseminating quotations of identified broker-dealers. Today, the vast majority of broker-dealer quotation activity for OTC securities occurs on certain ATSs,[161] which, in practice, have become repositories for information about the issuers of securities that are quoted in their market. These ATSs generally provide facilities and set criteria for broker-dealers to display quotations for OTC securities to subscribers and for the orders of subscribers to interact, match, and execute with broker-dealers' quotes.

The Commission believes that the regulatory requirements for an IDQS that operates as an ATS under the Exchange Act—and the concomitant Commission oversight—would help to ensure investor protection and to prevent fraud and manipulation. The notice and reporting requirements under Regulation ATS contribute to the Commission's effective oversight of ATSs, which helps to prevent fraud and manipulation. For example, ATSs, including those that make known to others broker-dealers' publications of quotations concerning quoted OTC securities, are required to file an initial operation report on Form ATS with the Commission to disclose, among other things, information about the types of securities traded and procedures for entering and displaying orders, matching buyers and sellers, and executing, clearing, and settling trades on the ATS. ATSs are required to disclose on Form ATS classes of subscribers and differences in access to the services offered by the ATS to different groups or classes of subscribers. ATSs

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160 See Proposed Rule 15c2-11(a)(2), (f)(7), and (f)(8).

161 See, e.g., OTC Markets Stock Screener, supra note 5.

are required to disclose on a quarterly basis to the Commission on Form ATS-R information about subscribers who participated on the ATS, the securities that the ATS traded, and the transaction volume for securities traded.[162] The Commission believes that the existing Regulation ATS requirements would provide relevant information to the Commission about the qualified IDQS's operations, including quoting and trading activity in the ATS, and therefore contribute to Commission oversight of qualified IDQSs.[163]

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q111. Are the proposed definitions accurate? Please explain. What alternative definitions might be more effective in light of the purpose of the Rule?

Q112. Company insiders are described in proposed paragraphs (b)(5)(i)(K), (c)(1), and (f)(2)(ii). Should we add a definition for "company insiders" that would include such persons or different persons? Please explain. Should any other terms be defined? If so, are there existing definitions in other rules or regulations that could be used in this context? Why would the use of such other definitions be appropriate?

Q112. Should non-ATS IDQSs be permitted to conduct the review under the proposed amendments, or should the review be limited to qualified IDQSs as proposed? Why or why not? Commenters are requested to please include any data and analysis that they have to support their response.

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[162] See Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, 70905 (Dec. 22, 1988).

[163] See, e.g., Rule 301(b)(9) of Regulation ATS.

Q114. Are there concerns with not proposing a definition of "nominal" in the context of the proposed definition of "shell company"? Please explain any concerns and provide examples.

I. Proposed Amendment to the Nasdaq Security Exception

Currently, Rule 15c2-11(f)(5) excepts from the provisions of the Rule the publication or submission of a quotation for a Nasdaq security where such security's listing is not suspended, terminated, or prohibited.[164] This exception, known as the Nasdaq security exception, was designed to make it clear that then-Nasdaq qualification standards superseded those of other IDQSs.

The Nasdaq security exception is obsolete in light of Nasdaq's registration as a national securities exchange. The publication or submission of quotations by a broker-dealer for securities listed on a national securities exchange are covered already by a separate exception under existing Rule 15c2-11(f)(1). Thus, the Commission proposes to rescind the Nasdaq security exception.

J. Proposed Amendments to the Furnishing Requirement and Annual, Quarterly, and Current Reports of Reporting Issuers

1. Proposed Amendment to Remove Furnishing Requirement for Catch-All Issuer Information

The existing Rule requires that broker-dealers that publish or submit quotations for securities of catch-all issuers provide the Rule's required information to the IDQS at least three

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[164] Exchange Act Rule 15c2-1(f)(5). The Commission adopted 15c2-11(f)(5) in 1984 as an exception to the Rule for securities that were quoted on "an inter-dealer quotation system sponsored and governed by the rules of a registered securities association." 1984 Adopting Release at 45123. At the time, this description referred only to the IDQS operated by the NASD. The Rule was amended in 1991 to specifically refer to quotations concerning a "Nasdaq security" because other IDQSs arose since 1985, namely OTC Service and PORTAL system, that fit the exception as adopted in 1985, and the Commission wished to limit the exception only to the particular IDQS operated by NASD in 1985. See 1991 Adopting Release at 19155. Once Nasdaq became a national securities exchange in 2006, however, the rationale for the exception became anachronistic.

business days before the quotation is published or submitted.[165] The Commission is proposing to remove the requirement that broker-dealers furnish catch-all issuer information to an IDQS. The purpose of this requirement is to afford the IDQS and regulators sufficient time to obtain and review the information in advance of a broker-dealer's publication of quotations.[166] The Commission believes that requiring broker-dealers to furnish catch-all issuer information to an IDQS is outdated and no longer necessary because, as a practical matter, IDQSs no longer independently review a broker-dealer's compliance with the information review requirement. Today, FINRA, a registered national securities association, regulates broker-dealer compliance with Rule 15c2-11 by requiring its members to demonstrate compliance with Rule 15c2-11 by filing a form (Form 211) with FINRA, which must be received at least three business days before the member's quotation is published or displayed in a quotation medium. Accordingly, it is redundant to require broker-dealers both to submit information to an IDQS and to comply with the requirements imposed by a registered national securities association.

2. Proposed Amendments to Obtain Annual, Quarterly, and Current Reports Directly from the Issuer

The existing Rule provides that a broker-dealer complies with the requirement to obtain annual, quarterly, and current reports filed by the issuer if the broker-dealer has made arrangements to receive such reports when they are filed by the issuer and it has regularly received reports from the issuer on a timely basis.[167] This provision, which was added to the Rule in 1991, is outdated because it does not take into account that periodic and current reports

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165 Exchange Act Rule 15c2-11(d)(1).

166 1991 Adopting Release at 19155.

167 Exchange Act Rule 15c2-11(d)(2)(ii).

can be obtained by broker-dealers through EDGAR, without obtaining such reports from the issuer. Accordingly, given technological developments and access to annual, quarterly, and current reports on EDGAR, the Commission believes that it is appropriate to remove this provision from the Rule because access to periodic and current reports precludes the need to obtain such reports directly from the issuer.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q115. Rule 15c2-11(d)(1) requires that a broker-dealer publishing or submitting a quotation for a security of a catch-all issuer furnish to an IDQS, at least three business days before the quotation is published or submitted, the required information regarding the security and the issuer. Should this requirement be retained? Why, or why not?

Q116. Should the Commission retain Rule 15c2-11(d)(2)(ii)? Why, or why not?

K. Proposed Amendment to Commission Exemptions from Rule 15c2-11

The Commission is proposing modifications to existing paragraph (h), which would be re-lettered to proposed paragraph (g), regarding the Commission's grant of exemptions from the Rule to correspond to Section 36 of the Exchange Act.[168] Section 36 was enacted after the most recent substantive amendments to this Rule were adopted. The proposed amendment explicitly states that consistent with Exchange Act Section 36(a), the Commission may grant an exemption from the Rule for any class of security under specified circumstances.[169] In particular, the Commission is removing the requirement that before granting an exemption, the Commission

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168 See Exchange Act Section 36.

169 See Proposed Rule 15c2-11(g).

must find that the exempted quotation will not "constitut[e] a fraudulent, manipulative, or deceptive practice comprehended within the purpose of this section"[170] and replacing it with a public interest finding, consistent with Section 36(a).[171] The Commission believes that the appropriate standard for granting an exemption from Rule 15c2-11 should mirror the standard that is articulated in Section 36 of the Exchange Act.

Q117. Should the existing requirement that, before granting an exemption, the Commission find that the quotation will not "constitut[e] a fraudulent, manipulative, or deceptive practice comprehended within the purpose of this section" be retained? Why or why not?

L. Proposed Amendment to Remove Preliminary Note

Currently, the Rule includes a "Preliminary Note" that incorporates guidance issued with the Rule in the 1991 Adopting Release. Specifically, the Preliminary Note advises that broker-dealers "may wish to refer to Securities Exchange Act Release No. 29094 (April 17, 1991), for a discussion of procedures for gathering and reviewing the information required by [Rule 15c2-11] and the requirement that a broker-dealer have a reasonable basis for believing that the information is accurate and obtained from reliable sources." The Commission is proposing to remove the Preliminary Note from the Rule and instead reiterate the guidance, with targeted updates, to accompany the proposed Rule. The proposed guidance is discussed in Part V below.

Q118. Should the Preliminary Note be retained in its current form, in the form of guidance as proposed, or in a different form?

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170 See Exchange Act Rule 15c2-11(h).

171 See Proposed Rule 15c2-11(g).

M. Technical Amendments to Rule Text

The Commission is proposing technical, non-substantive amendments to the Rule that do not change the meaning or operation of any of the Rule's provisions. As discussed above, because the Commission is proposing to separate the review requirement from the Rule's required information provisions, the Commission is proposing to re-letter the Rule's provisions and make conforming edits to all cross-references within the Rule to reflect the proposed re-lettering. The Commission is also proposing to alphabetize defined terms under the Rule's definitional section and to re-letter the Rule's definitional provisions.

In addition, the Commission is proposing grammatical edits to the Rule. For example, the Commission is proposing to (1) amend the Rule's definition of "quotation" in proposed paragraph (e)(6) by replacing the word "he" with "its," (2) replace the word "which" with the word "that" where appropriate, (3) add and delete commas in proposed paragraph (b)(5)(i)(P) to provide clarity, and (4) fix typographical errors. In addition, the Commission is proposing to spell out all numbers that are less than 10 (e.g., the number 4 in the existing piggyback exception would be spelled out as the word "four").

Further, the Commission is proposing amendments to aid in the Rule's readability. For example, the Commission is proposing to amend the Rule by adding headings before certain of the Rule's provisions and by addressing instances of inconsistent letter capitalization (e.g., by ensuring that all phrases such as "Provided, however, That" are written consistently throughout the Rule). In addition, the Commission is proposing to add the term "that is" in proposed paragraph (f)(1) when referring to a security that is admitted to trading on a national securities exchange. The Commission also is proposing amendments to replace the word "shall" with "must" where appropriate (e.g., proposed paragraph (b)(5), addressing the public availability of

catch-all issuer information), and is proposing to replace the word "respecting" with the word "concerning" (e.g., proposed paragraph (f)(3), in the provisions of the piggyback exception). To be consistent with other rules under the Exchange Act, the Commission is proposing to replace any references to the Financial Industry Regulatory Authority, Inc. with a reference to a registered national securities association. In addition, the Commission proposes to add the phrase "of the broker or dealer" in proposed paragraph (b)(5)(i)(N) to clarify that the required information refers to any associated person of the broker-dealer. In addition, the Commission is proposing conforming changes to begin each paragraph of proposed paragraph (b) in the same manner to be consistent in listing the issuer information that the Rule would require.

The Commission also is proposing amendments to streamline and clarify the Rule's text. For example, the Commission is proposing to replace the phrase "a record of the circumstance involved in" with the phrase "records related to" in proposed paragraph (c)(1). The Commission also proposes to replace "customer's indication of interest and does not involve the solicitation of the customer's interest" in paragraph (f)(2) with "customer's unsolicited indication of interest" in proposed paragraph (f)(2). Finally, the Commission proposes to delete the word "exact" from existing paragraphs (a)(5)(i) and (iv) and replace the phrase "the nature" with the phrase "a description" in paragraphs (a)(5)(viii), (ix), and (x).

The Commission also is proposing amendments to avoid redundancy in the Rule's text. For example, the Commission is proposing to remove from the Rule all instances of the phrase "as defined in this section" because the text of the Rule's definitional section, proposed paragraph (f), makes it sufficiently clear that all instances where a particular defined term is mentioned are for the purposes of the Rule, unless as otherwise specified. In addition, the

Commission is proposing to delete the word "said" from existing paragraph (d)(1) because the words "of this section" also would appear in the text of the proposed Rule.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following question:

Q119. Are there other technical amendments that would be appropriate? Please explain. Are there additional technical edits that the Commission should make to improve the effectiveness and clarity of the proposed Rule? For example, should the requirement regarding information about an issuer's address be modified to require the issuer's "physical" address to differentiate it from a post office box or other possible mailing or alternative addresses that issuers may have, such as addresses of branch offices, prior or obsolete addresses, or other non-physical addresses such as a service of process address?

Q120. Is there language in the proposed Rule that should be revised to improve the effectiveness and clarity of the Rule? In particular, we seek commenters' input regarding whether there is language in proposed paragraph (b) that should be revised. If so, how? For example, proposed paragraphs (b)(4) and (b)(5) would keep the existing requirement that information be made available upon the request of "a person expressing an interest about a proposed transaction in the issuer's security." Is there alternative language that would be more clear or effective in light of the purpose of the Rule? For example, should the language be replaced with "a person seeking information about the issuer's security" or "a person inquiring about an issuer's security"? Please explain. Is it clear what type of information that a broker-dealer must provide to any person expressing an interest in the security of an exempt foreign private issuer or catch-all issuer where it is required to provide "appropriate" instructions? If not, what alternative standard would be clear and effective, if any? Please explain.

IV. Conforming Rule Change and General Request for Comment

A. Proposed Conforming Amendments to Cross-References in Rule 144(c)(2)

Currently, Rule 144(c)(2)[172] cross-references Rule 15c2-11(a)(5)(i) to (xiv) and Rule 15c2-11(a)(5)(xvi). Because the Commission is proposing to re-letter the provision addressing catch-all information to Rule 15c2-11(b)(5), the Commission is proposing to make conforming amendments to these cross-references in the provisions of Rule 144(c)(2) that cite to Rule 15c2-11(a)(5). The Commission is proposing to amend Rule 144(c)(2) to cross-reference Rule 15c2-11(b)(5)(i)(A) to (N) and Rule 15c2-11(b)(5)(P), and the Commission is proposing to remove the cross references to Rule 15c2-11(a)(5)(i) to (xiv) and Rule 15c2-11(a)(5)(xvi).

B. General Request for Comment

The Commission solicits comment on all aspects of the proposed amendments to Rule 15c2-11 and any other matter that might have an impact on the proposal discussed above. In particular, the Commission asks commenters to consider the following questions:

Q121. Are there additional or different ways to amend the Rule that would help reduce fraud and manipulation in the OTC market? Please explain.

Q122. Should the Rule be limited to only equity securities? Please explain.

Q123. How might the proposal positively or negatively impact investor protection, the maintenance of a fair, orderly, and efficient OTC market, and capital formation?

Q124. Should each exception to the Rule require that a broker-dealer establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent violations of the Rule by the broker-dealer? Please explain why or why not.

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[172] Securities Act Rule 144(c)(2).

Q125. We seek commenters' views about the potential for changes to Rule 15c2-11 to help investors track quoted OTC issuers through corporate events such as reverse mergers and reorganizations. For example, should Rule 15c2-11's publicly available information requirement for a quoted OTC security issuer's name and its predecessor (if any) also require the public availability of such issuer's unique entity identifiers (if any)? What would the costs and benefits associated with such a requirement be? Please discuss whether such a requirement should be limited to certain types of issuers, e.g., catch-all issuers? Please quantify answers, to the extent possible.

Comments are of greatest assistance to the Commission's rulemaking initiative if they are accompanied by supporting data and analysis of the issues addressed in those comments and if they are accompanied by alternative suggestions to the proposal where appropriate.

V. Proposed Guidance

The Commission is proposing the following guidance to accompany the proposed Rule and intends to include such guidance in any adopting release.[173] If the Commission includes this new guidance in an adopting release, the guidance provided in the 1991 Adopting Release and referenced in the Preliminary Note to the Rule would be superseded. Broker-dealers and qualified IDQSs complying with the information review requirement under the proposed Rule must have a reasonable basis under the circumstances for believing, based on a review of proposed paragraph (b) information, together with any supplemental information required by proposed paragraph (c), that (1) the proposed paragraph (b) information is accurate in all

[173] The Commission's 1999 Reproposing Release included proposed guidance in an Appendix that was intended to supplement the 1991 guidance with greater detail concerning, among other things, red flags. However, the Commission took no further action on the 1999 Reproposing Release, including the Appendix. The 1999 Appendix is not included in the Commission's proposed new guidance.

material respects and (2) the sources of the paragraph (b) information are reliable.[174] Accordingly, the Commission proposes to provide the following basic principles to guide broker-dealers or qualified IDQSs in complying with the information review requirement.

A. Source Reliability

The proposed Rule requires that the broker-dealer or qualified IDQS must have a reasonable basis for believing that any source of the proposed paragraph (b) information is reliable. In the absence of any red flag (e.g., information that, under the circumstances, reasonably indicates that the source is unreliable), a broker-dealer or qualified IDQS could satisfy the proposed Rule's requirements regarding the reliability of the information source if that information were provided by the issuer of the security or its agents, including its officers and directors, attorney, or accountant, or was obtained from an independent information service, a document retrieval service, or standard research sources such as reputable and commonly used internet websites used to research information related to securities issuers.

Occasionally, a broker-dealer or qualified IDQS may receive Rule 15c2-11 information about an issuer from another broker-dealer, someone other than the issuer or its agents, or an independent information service. In these situations, while the broker-dealer or qualified IDQS might be aware of the identity of the immediate source of the specified information, it might not have any knowledge about the person that compiled the Rule 15c2-11 information. However, to comply with the proposed Rule's requirements regarding source reliability, the broker-dealer or

[174] Proposed Rule 15c2-11(a)(1)(iii)(A) and (B). The Commission would make conforming changes to this guidance as needed in the adopting release; for example, by removing the word "proposed" wherever it appears in this guidance.

qualified IDQS is required to ascertain the reliability of the sources of the Rule 15c2-11 information.

Where the broker-dealer or qualified IDQS receives the information, however, from an independent and objective source that represents that it received the information directly from the issuer, the broker-dealer or qualified IDQS typically could rely on that representation absent countervailing information. When a red flag regarding the source's reliability exists, the broker-dealer or qualified IDQS should conduct the inquiry called for by the circumstances to reasonably assess whether the source of the information is reliable.

B. Information Review Requirement

Once the broker-dealer or qualified IDQS has a reasonable belief as to the source's reliability, it should examine the materials in its records to make certain that all of the required information has been obtained. Next, the broker-dealer or qualified IDQS should review the proposed paragraph (b) information in the context of all other information, including supplemental information under proposed paragraph (c), about the issuer that it has in its knowledge or possession. Ordinarily, the broker-dealer or qualified IDQS need not take any further steps (for example, there would be no requirement to look behind the financial statements or any other information required to be obtained). However, in its review, the broker-dealer or qualified IDQS, consistent with proposed paragraphs (a)(1)(iii) and (a)(2)(iii), respectively, must be alert to any red flags (e.g., information under the circumstances that reasonably indicates that one or more of the required items of information may be materially inaccurate or from an unreliable source). Red flags would be indicated, for example, by material inconsistencies in the proposed paragraph (b) information or material inconsistencies between that information and other information in the broker-dealer's or qualified IDQS's knowledge or possession. In the

absence of red flags, a broker-dealer does not have an obligation to seek out supplemental information to investigate statements in the proposed paragraph (b) information. In forming a reasonable basis under the circumstances for believing that proposed paragraph (b) information is accurate in all material respects, a broker-dealer would only need to consider supplemental information that has come to its knowledge or that is in its possession.

Examples of red flags would include a qualified auditor's opinion resulting from management's failure to provide all of the information relevant to prepare the financial statements, or financial statements of a development stage issuer that lists as the principal component of its net worth an asset wholly unrelated to the issuer's lines of business. Warning signs such as these may call into question whether the accuracy of the information can be relied upon by a broker-dealer or a qualified IDQS to satisfy the proposed Rule's requirements.

Where no red flags appear during this review process, the broker-dealer or qualified IDQS could have a reasonable basis for believing that the information is accurate. If red flags appear, the broker-dealer or qualified IDQS could attempt to reasonably address any red flags. The specific efforts by the broker-dealer or qualified IDQS to satisfy the proposed reasonable basis standard with respect to the accuracy of the information and the reliability of sources can vary with the circumstances and may require the broker-dealer or qualified IDQS to obtain additional information or seek to verify the accuracy of existing information. For example, the broker-dealer or qualified IDQS may have a reasonable basis to believe that the information is accurate in all material respects after questioning the issuer directly. When information from the issuer is not adequate, or raises reasonable doubts to the broker-dealer or qualified IDQS, the broker-dealer or qualified IDQS may wish to consult independent sources, such as an attorney or accountant.

The proposed Rule would require that a broker-dealer or qualified IDQS have a reasonable basis under the circumstances for believing that proposed paragraph (b) information, in light of any other documents and information required by the proposed Rule, such as proposed paragraph (c) information, is accurate in all material respects. However, the requirements of the proposed Rule amendments do not contemplate that, before submitting or publishing quotations for a security, a broker-dealer or qualified IDQS must conduct any independent "due diligence" investigation concerning the issuer or its business operations and financial condition such as the investigation expected to be conducted by an underwriter. A broker-dealer or qualified IDQS publishing quotations may have no relationship with the issuer of the security. The proposed Rule would not demand that the broker-dealer or qualified IDQS develop such a relationship to obtain information about the issuer. Rather, as described above, the proposed Rule specifies the information that must be gathered, and the proposed Rule's requirements would be satisfied if the broker-dealer or qualified IDQS had a reasonable basis for believing that the information is accurate in all material respects and obtained from a reliable source, after reviewing that information. In short, a reasonable basis for belief in the accuracy of the proposed paragraph (b) information can be founded solely on a careful review of the proposed paragraph (b) information together with proposed paragraph (c) information, provided that the proposed paragraph (b) information was obtained from sources reasonably believed to be reliable and there are no red flags. When red flags are initially present, the broker-dealer or qualified IDQS may, upon inquiry, obtain additional information that provides a reasonable basis for believing that the information is accurate in all material respects and that the sources are reliable.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q126. Are further substantive changes needed to ensure this guidance reflects the current state of technology and industry practice? Should the substance of this guidance be incorporated into the rule text and, if so, are there any changes that should be made?

Q127. Are changes to this guidance needed to address the specific responsibilities with respect to the information review requirement of a qualified IDQS that makes known to others the quotation of a broker-dealer?

Q128. In 1999, the Commission re-proposed amendments to Rule 15c2-11.[175] In response to comments that the Commission received regarding the 1998 Proposing Release expressing concerns about broker-dealers' review obligations, the Commission also included an Appendix in the 1999 Reproposing Release ("1999 Appendix") that provided guidance to broker-dealers on the scope of the review required by the Rule and provided examples of red flags that broker-dealers should look for when reviewing issuer information.[176] The 1999 Appendix, which was not adopted by the Commission, would have confirmed and supplemented earlier guidance on Rule 15c2-11 issues.[177] Should the Commission incorporate the 1999 Appendix as part of guidance included in any adopting release? If so, should the guidance from the 1999 Appendix be modified, updated or expanded? Are there additional examples of red flags that should be discussed in any such modified, updated or expanded guidance? Are there red flags that should be removed from the guidance? What current topics or issues would commenters like to see addressed in an updated or expanded version of the guidance on Rule

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175 1999 Reproposing Release at 11124.

176 Id., 1999 Reproposing Release at 11145.

177 Id., 1999 Reproposing Release at 11146 n.7.

15c2-11? Should the Commission provide guidance on the proposed amendments to the Rule and if so, for which amendments to the Rule would guidance be most helpful?

VI. Concept Release

This section discusses regulatory, policy, and other issues (in addition to those discussed above), and seeks comment to identify, where appropriate, possible regulatory actions to address those issues.

A. Information Repositories

The amendments the Commission is proposing today would require that proposed paragraph (b) information be current and publicly available, prior to the initial publication or submission of a quotation regarding a security, in order for a broker-dealer to: rely on the unsolicited quotation exception in certain instances, rely on certain new exceptions under proposed paragraph (f), and continue to rely on the piggyback exception. In the 1999 Reproposing Release, the Commission proposed to establish a mechanism to designate as an information repository an entity that retains and provides access to paragraph (a) information[178] while eliminating the piggyback provision.[179] As stated in the 1999 Reproposing Release, "the elimination of the piggyback provision and the potential for increased costs of compliance suggest the desirability of having a database of information about the non-reporting issuers of quoted OTC securities."[180] Although the Commission is not proposing to eliminate the piggyback exception, it would eliminate reliance on the exception when proposed paragraph

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178 Id., 1999 Reproposing Release at 11134.

179 Id., 1999 Reproposing Release at 11127.

180 Id., 1999 Reproposing Release at 11134.

(b)(5) information is not current and made publicly available within six months prior to the date the broker-dealer publishes or submits a quotation for the security in the IDQS.

Significant developments in the OTC market have taken place since the publication of the 1999 Reproposing Release. For example, certain IDQSs have developed information repositories that provide access to proposed paragraph (b) information to the investing public.[181] Additionally, the Internet, which provides an easy way for investors to locate more, relevant information about issuers, has become much more accessible to the public.[182] Such developments have allowed issuers to directly reach the investing public and potential customers for their products or services. Given market developments and the ability for issuers to communicate more easily and directly with the investing public, the Commission questions whether it, at this point, should impose a regulatory structure around information repositories. In the 1999 Reproposing Release,[183] the Commission articulated the following considerations when determining whether an entity should be designated an information repository:

- Collects information about a substantial segment of issuers of securities subject to the Rule;
- Maintains current and accurate information about such issuers;
- Has effective acquisition, retrieval, and dissemination systems;

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181 See Company News & Financial Reports, OTC Mkts. Grp. Inc. (last visited Aug. 13, 2019), https://www.otcmarkets.com/market-activity/news.

182 See Camille Ryan & Jamie M. Lewis, Computer and Internet Use in the United States: 2015, U.S. Census Bureau (Sept. 2017), available at https://www.census.gov/content/dam/Census/library/publications/2017/acs/acs-37.pdf ("Among all households, 78 percent had a desktop or laptop, 75 percent had a handheld computer such as a smartphone or other handheld wireless computer, and 77 percent had a broadband Internet subscription.").

183 1999 Reproposing Release at 11134.

• Places no inappropriate limits on the issuers from or about which it will accept or request information;

• Provides access to the documents deposited with it to anyone willing and able to pay the applicable fees; and

• Charges reasonable fees.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q129. Would access to proposed paragraph (b) information on an issuer's website provide sufficient access and notice to investors? What if the issuer does not maintain the information on its website for the requisite recordkeeping period?

Q130. Would investors and other market participants benefit from having access to proposed paragraph (b) information solely through a centralized location, such as an information repository?

Q131. Have any entities that currently publish proposed paragraph (b) information engaged in any actions that would warrant Commission intervention? If so, what activities has the entity engaged in and what would the appropriate regulatory action be?

Q132. The Commission is committed to ensuring that all investors and market participants can access the information necessary to make informed financial decisions. One way that the Commission lowers the burden of accessing and analyzing issuer data is through the use of structured data. Machine-readable disclosures provide easily accessible financial statement information that investors and other market participants can use to compare and analyze issuers, whether they elect to analyze condensed data sets themselves or analyze data downstream through a data aggregator service. Regarding actions that the Commission might

propose at a later date, the Commission is interested in commenters' views on whether or not the financial information required by proposed paragraph (b)(5)(i)(L) regarding an issuer's balance sheet, profit and loss statement, and retained earnings statement should be published in a machine readable format? Is there other proposed paragraph (b) information that should be machine-readable, if the Commission were to propose to require that proposed paragraph (b) information be machine-readable at a later date? How burdensome and costly would it be for a broker-dealer, qualified IDQS, or an issuer to provide such information in a machine-readable format? What are the additional burdens or costs associated with providing such information in a machine-readable format? For example, would there be additional costs with respect to complying with documentation and recordkeeping requirements, specifically those included in the proposed amendments to the Rule, as a result of information being machine-readable? How significant are those potential costs relative to the potential benefits in facilitating an analysis of an issuer's financial data by investors or other market participants? Please quantify your answers, to the extent feasible.

The Commission is also interested in the public's views on the following question regarding short selling in the OTC market:

Q133. At least one commenter to the SEC Investor Advisory Committee has suggested that amending Regulation SHO to extend the time period required to close out fails to deliver would enhance liquidity in the OTC market.[184] Would extending the Regulation SHO close-out period for certain market participants enhance price discovery that could result from short selling

[184] See, e.g., Submission of Cromwell Coulson, OTC Mkts. Grp. Inc., SEC Investor Advisory Committee: Regulatory Approaches to Combat Retail Investor Fraud, 1–2 (Mar. 8, 2018), available at https://www.sec.gov/comments/265-28/26528-3213626-161999.pdf.

without also increasing the potential for abusive short selling in this market?[185] Please provide any data to show that amending Regulation SHO would enhance short selling in the OTC market versus other possible reasons that may affect short selling in quoted OTC securities, such as margin or capital rules or Regulation T. What types of market participants should be provided such an extension of time (e.g., market makers)? Would such an extension increase the potential for manipulative "naked" short selling? Would such an extension increase the incidence of fails to deliver in quoted OTC securities? How could the Commission provide such an extension without increasing the potential for abuses or increased fails to deliver? For example, should an extension only be provided for certain types of market makers and not others? What criteria or standards should apply to eligible market makers to reduce the potential for increased manipulation from an extension of the Regulation SHO close-out period? How would amending rules to increase short selling in the OTC market protect retail investors?

VII. Paperwork Reduction Act Analysis

A. Background

Certain provisions of the Rule and proposed amendments impose "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[186]

The Commission is submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[187] The title for the information collection is "Publication or submission of quotations without specified information." OMB has

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185 See Rule 204 of Regulation SHO.

186 44 U.S.C. 3501 et seq.

187 See 44 U.S.C. 3507; 5 CFR 1320.11.

assigned control number 3235-0202 to the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid control number.

The Rule is intended to prevent broker-dealers from publishing or submitting quotations for quoted OTC securities that may facilitate a fraudulent or manipulative scheme. Subject to certain exceptions, the Rule prohibits broker-dealers from publishing or submitting a quotation for a security, or submitting a quotation for publication, in a quotation medium unless they have reviewed specified information concerning the issuer. The Commission is proposing amendments that would focus the Rule more closely on those quoted OTC securities that the Commission believes are more likely to be prone to fraud and manipulation by addressing the lack of transparency of some issuers. The Commission is also proposing amendments to reduce regulatory burdens on broker-dealers for quotations concerning OTC securities that appear to present lower risk.

B. Respondents Subject to the Rule

Generally, the Rule applies to broker-dealers that participate in the quoted market for OTC securities. The proposed amendments would modify some of the existing information collection burdens on broker-dealers and create new record retention obligations on broker-dealers that rely on exceptions to the Rule. The Commission believes that approximately 32 broker-dealers would be subject to the burdens associated with the publishing or submitting a quotation without an exception,[188] and approximately 89 broker-dealers would be subject to the

[188] Thirty-two broker-dealers submitted Forms 211 to FINRA in 2018. The Commission uses this number as a proxy for broker-dealers that comply with the information review requirement under paragraphs (a), (b), and (c) of the existing Rule.

burdens associated with documenting reliance on an exception in proposed paragraph (f).[189] Additionally, the Commission estimates that one qualified IDQS[190] and one registered national securities association[191] would be subject to burdens associated with making publicly available determinations under proposed paragraph (f)(8).

Proposed paragraph (f)(7) would permit a qualified IDQS to comply with the information review requirement in certain circumstances. A qualified IDQS must meet the definition of an alternative trading system under Rule 300(a) of Regulation ATS and operate pursuant to the exemption from the definition of an "exchange" under Rule 3a1-1(a)(2) of the Act. As such, a qualified IDQS must be registered as a broker-dealer.[192] This proposed paragraph would modify only the allocation of burden from existing paragraphs (a), (b), and (c) between qualified IDQSs and broker-dealers that are not qualified IDQSs, rather than create new and distinct burdens. Therefore, burdens of the proposed amendments on qualified IDQSs have not been analyzed in a manner that is distinct from those of broker-dealers below. The analysis of burdens for qualified IDQSs and registered national securities associations are separated from those of broker-dealers in the section discussing proposed paragraph (f)(8) below.

For the purposes of this analysis, as described below, the Commission has made assumptions regarding how respondents would comply with the proposed amendments.

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189 As of July 2, 2019, there are 89 broker-dealers that trade on OTC Markets Group's systems. The Commission believes that this number reasonably estimates the number of broker-dealers that would engage in the activity that would subject them to the requirements discussed in the section "Other Burden Hours" below because they are the only broker-dealers that are publishing or submitting quotations for OTC securities.

190 Based on the current structure of the market for quoted OTC securities, the Commission preliminarily believes that only one qualified IDQS would engage in a review pursuant to proposed paragraph (f)(7) or make publicly available determinations under proposed paragraph (f)(8).

191 As of July 15, 2019, only one registered national securities association exists.

192 See Rule 301(a) of Regulation ATS.

C. Summary of Collections of Information

The information collections associated with the initial publication or submission of a quotation is intended to prevent broker-dealers from publishing or submitting quotations for OTC securities that may facilitate a fraudulent or manipulative scheme. Additionally, under the proposed amendments, the information collections are intended to alleviate the potential for quoted OTC Securities to be used as vehicles to defraud investors and to help ensure compliance with the Rule's exceptions.

1. Burden Associated with the Initial Publication or Submission of a Quotation in a Quotation Medium

Absent an exception, broker-dealers under the existing Rule must comply with the information review requirement of the Rule prior to initiating the publication or submission of a quotation for an OTC security. The Commission believes that the information collections associated with the information review requirement and recordkeeping requirement under the Rule, as well as the proposed Rule, involve conducting a review of and maintaining the required information.[193]

FINRA Rule 6432 requires broker-dealers to file a Form 211 when the Rule requires them to comply with the information review requirement. Given the alignment of this FINRA requirement and the Rule, the Commission believes that the number of Forms 211 filed with FINRA in 2018 provides a reasonable baseline from which to estimate the burdens associated with the information review requirement under the current Rule and as proposed to be amended. Based on information provided by FINRA, broker-dealers submitted a total of 538 Forms 211 to

[193] As described above, the Commission is proposing to remove the disclosure requirement in Exchange Act Rule 15c2-11(d)(1). This disclosure requirement previously has been discussed as a component of the estimated burden under Rule 15c2-11 for all issuers, and, as a result, is included in the existing burden estimates for the Rule.

initiate the publication or submission of quotations of OTC securities in 2018. FINRA counted that 91 of these Forms 211 concerned securities of prospectus issuers, Reg. A issuers, and reporting issuers; 391 concerned securities of exempt foreign private issuers, and 56 concerned securities of catch-all issuers. The Commission estimates that it takes about three hours to review, record, and retain the information pertaining to prospectus issuers, Reg. A issuers, and reporting issuers, and seven hours to review, record, and retain the information pertaining to exempt foreign private issuers and catch-all issuers.[194] As a starting point, therefore, absent the proposed amendments, the estimated annual burden of the information collection would be 3,402 hours.[195]

The proposed amendments change the information review requirement only by re-lettering the applicable paragraphs[196] and by adding the requirement that proposed paragraph (b) information be current and publicly available prior to the initial publication or submission of a quotation.[197] The Commission believes that these two proposed changes would not modify the

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[194] The Commission believes that these burden hour estimates reasonably measure the time required to comply with the information review requirement and recordkeeping requirement utilizing available technology and include additional time to review information about exempt foreign private issuers and catch-all issuers because the information required to be reviewed concerning these issuers may not be as readily available as the required information concerning prospectus, Reg. A, and reporting issuers.

[195] (91 prospectus, Reg. A, and reporting issuers x 3 hours) + (391 exempt foreign private issuers x 7 hours) + (56 catch-all issuers x 7 hours review and recordkeeping) = 3,402 hours.

[196] Under the proposed amendments, the information review requirement would be contained in proposed paragraphs (a), (b), and (c).

[197] Proposed paragraph (f)(8) would allow a broker-dealer to rely on publicly available determinations by a qualified interdealer quotation system or a registered national securities association that proposed paragraph (b) information is current and publicly available, as well as whether a broker-dealer may rely on an exception contained in proposed paragraphs (f)(1), (f)(3)(i)(A), (f)(3)(i)(B), (f)(4), (f)(5), or (f)(7). This new paragraph is intended to mitigate costs and burdens of certain of the proposed exceptions by allowing broker-dealers to rely on determinations of third parties. While, as discussed below, proposed paragraph (f)(8) impacts the recordkeeping requirement unrelated to the information review requirement, the Commission does not believe that this proposed change would impact the hourly burden attributable to completion of the information review requirement.

burden hours for completion of the information review requirement that are estimated above. Additionally, it is not expected that the proposed changes to the information review requirement would create any initial one-time burden as it is unlikely that broker-dealers would need to modify their systems or their training practices to comply with the information review requirement under the proposed amendments.[198]

a) Proposed Amendments to the Piggyback Exception

As discussed above, the proposed amendments would modify the piggyback exception in various ways, and these amendments would, in turn, impact the burdens associated with the information review requirement.

Proposed paragraph (f)(3)(i)(A) would limit broker-dealers' reliance on the piggyback exception to both bid and ask quotations at specified prices in an IDQS, which could reduce the number of securities that are eligible for the piggyback exception. Broker-dealers would be required to comply with the information review requirement prior to the initial publication or submission of quotations on securities that would lose piggyback eligibility due to this provision. According to estimates based on data from OTC Markets Group for 2018, the securities of 879 issuers, out of 9,912 issuers, would lose piggyback eligibility under this proposed amendment because they did not have both bid and ask quotations for four business days in succession on one or more occasions during that year. Based on the lack of quotes by broker-dealers, it is unclear whether broker-dealers would conduct the required review for most of these securities that would lose piggyback eligibility due to the adoption of this proposed requirement.

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[198] The Commission does not attribute an initial burden of the proposed amendments to the information review requirement; an initial burden has been attributed to determining whether proposed paragraph (b) information is current and publicly available, discussed below. See infra Part VII.C.2.

It is possible, however, that broker-dealers would begin to publish both bid and ask quotations for some of these securities to ensure that they remain piggyback eligible. While, as stated above, it is unclear whether broker-dealers would comply with the information review requirement as proposed for these issuers, the Commission is estimating that broker-dealers would comply with the information review requirement once annually for each security that would lose piggyback eligibility to make the most conservative estimate of burden that may arise under this proposed amendment.[199] Therefore, it is estimated that broker-dealers would comply with the information review requirement 879 additional times annually. The Commission estimates that the ratio of prospectus, Reg. A, and reporting issuers to exempt foreign private and catch-all issuers would roughly be consistent with the 2018 numbers for each type of security based on the proposed amendments; therefore, 402 of these affected issuers would be prospectus, Reg. A, or reporting issuers, 187 would be exempt foreign private issuers, and 290 would be catch-all issuers, leading to an increase in the total annual burden of 4,545 hours.[200]

The Commission is increasing the estimated overall burdens related to the information review requirement based on the proviso in proposed paragraph (f)(3)(ii), which would allow broker-dealers to rely on the piggyback exception for the securities of catch-all issuers if proposed paragraph (b)(5) information is current and has been made publicly available within six months prior to the date of publication or submission of the quotation. Proposed paragraphs

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[199] The Commission believes that this conservative estimate is reasonable because it accounts for all securities that may lose piggyback eligibility under this proposed amendment. While broker-dealers may not comply with the information review requirement for every security that loses piggyback eligibility, broker-dealers may comply with it multiple times concerning the same issuer. Therefore, the Commission believes that this reasonably approximates the impact of the proposed amendments industry-wide.

[200] (402 prospectus, Reg. A, or reporting issuers x 3 hours) + (187 exempt foreign private issuers x 7 hours) + (290 catch-all issuers x 7 hours review and recordkeeping) = 4,545 hours.

(a)(1)(ii) and (a)(2)(ii) would require that proposed paragraph (b) information be current and publicly available as a component of the review requirement, and thus a broker-dealer would not conduct the required review of the proposed Rule for these securities after they lose piggyback eligibility based on the lack of proposed paragraph (b) information that is current and publicly available.

On the one hand, to the extent proposed paragraph (b) information becomes current and publicly available after the loss of the piggyback exception, pursuant to proposed paragraph (a), a broker-dealer or qualified IDQS would need to comply with the information review requirement for a broker-dealer to be able to publish or submit a quotation for such OTC security. On the other hand, if there is no current and publicly available proposed paragraph (b) information for a security after the loss of the piggyback exception, the broker-dealer or qualified IDQS would not be able to conduct the required review due to the lack of current and publicly available proposed paragraph (b)(5) information. There were 3,211 issuers of quoted OTC securities in 2018 without current and publicly available information subject to the requirements of paragraph (b)(5). Similar to the proposed change discussed above concerning bid and ask quotations, it is unclear whether broker-dealers would conduct the required review for these securities if they lose piggyback eligibility. This lack of clarity exists because these securities would be subject to the proviso in proposed paragraph (f)(3)(ii) and the Commission is estimating that broker-dealers would comply with the information review requirement once annually for each security that would lose piggyback eligibility. Accordingly, this proposed amendment would increase burdens by 22,477 hours.[201]

[201] 3,211 catch-all issuers x 7 hours review and recordkeeping = 22,477 hours.

The Commission is not revising the estimates of current burdens of the information review requirement based on the proviso in proposed paragraphs (f)(3)(ii), which eliminate piggyback eligibility for shell companies and eliminate piggyback eligibility for 60 calendar-days following a trading suspension under Section 12(k) of the Act. With respect to shell companies, as noted in the Economic Analysis, the Commission believes that there are roughly 421 shell companies that are quoted in the OTC market. Since broker-dealers would not be able to rely on the piggyback exception for shell companies, the Commission believes broker-dealers would not conduct the required review for shell companies. As such, the Commission does not believe that the proposed elimination of a broker-dealer's ability to rely on the piggyback exception for shell companies would change the burdens of the information review requirement. With respect to securities that have been subject to a trading suspension under 12(k) of the Act, this proposed amendment would impact when a broker-dealer may conduct the required review, but it would not affect the substance of the information review requirement itself.

In summary, the proposed amendments to the piggyback exception would impact the burdens associated with the information review requirement in various ways. The proposed amendment to proposed paragraph (f)(3)(i)(A) would allow broker-dealers to piggyback only on bid and ask quotations at specified prices and the Commission estimates that this amendment would increase the annual burden by 4,545 hours. The proviso in proposed paragraph (f)(3) would allow broker-dealers only to piggyback quotations of the securities of catch-all issuers if proposed paragraph (b)(5) information is current and has been made publicly available within six months prior to the date of publication or submission of the quotation and the Commission estimates that this proposed amendment would increase the annual burden by 22,477 hours.

b) Other Proposed Amendments

Proposed paragraph (f)(5) would create a new exception to the Rule that is intended to reduce burdens related to publishing or submitting quotations for OTC securities the Commission believes are less susceptible to fraud or manipulation. Specifically, proposed paragraph (f)(5) would provide an exception for securities with a worldwide ADTV value of at least $100,000 during the 60 calendar days immediately before the date of the publication of a quotation for such security and the issuer of such security has $50 million in total assets and $10 million unaffiliated shareholder's equity as reflected in the issuer's publicly available audited balance sheet issued within six months after the end of the most recent fiscal year. Broker-dealers would not be required to comply with the information review requirement when publishing or submitting quotations for these securities, so these amendments would reduce the burden of the information collection. The Commission believes that excepting certain types of OTC securities from the Rule's provisions would decrease the burden associated with the information review requirement in a manner that is consistent with these securities' percentage of the overall OTC market.

Based on data pulled from Bloomberg's equity screening function on April 12, 2019, 37 issuers with securities trading on OTC Markets Group's systems meet the exception in proposed paragraph (f)(5). Thirty-one of these 37 issuers (roughly 80 percent) are reporting issuers, and six (roughly 20 percent) are catch-all issuers.[202] Bloomberg's dataset covers only 6,069 issuers with securities that are traded on OTC Markets Group's systems, but, from this number and the

[202] To arrive at this number, a list of excepted issuers that resulted when using Bloomberg's equity screening function to return issuers that meet the criteria in proposed paragraph (f)(5) was cross-referenced against the Reporting Status field in OTC Market's Company Data File dated March 29, 2019. Issuers that report pursuant to bank regulatory requirements were considered to be reporting issuers for the purposes of this number.

number of excepted issuers, it can be estimated that the proposed amendments would roughly decrease the amount of times broker-dealers conduct the required review by 0.5 percent annually. Therefore, after rounding, the Commission estimates that the exceptions would reduce the number of times broker-dealers conduct the required review by three per year,[203] two of which would be reporting issuers and one of which would be a catch-all issuer,[204] resulting in a total reduction of 14 burden hours per year.[205]

The Commission believes that, other than as discussed above, the proposed amendments to the Rule do not impact the burden of the information review requirement. For example, proposed paragraph (f)(2)(ii), which would provide an exception for a broker-dealer to publish or submit a quotation by or on behalf of certain company insiders in reliance on the unsolicited quotation exception only if proposed paragraph (b) information is current and publicly available,[206] would limit the availability of the unsolicited quotation exception in certain circumstances. There is no existing burden for the information review requirement for these types of quotations, however, because under paragraph (f)(2) of the existing Rule, broker-dealers are not required to conduct the review prior to publishing or submitting a quotation for these orders. Therefore, this proposed amendment would not decrease the burden of the information review requirement. If the unsolicited quotation exception becomes unavailable due to this proposed amendment, broker-dealers would not be able to complete the required review as an

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[203] 538 completions of the information review requirement x .5% = 3.

[204] 3 x 70% (reporting issuers) and 3 x 20% (catch-all issuers).

[205] (2 reporting issuers x 3 hours) + (1 catch-all issuer x 7 hours) = 13 hours.

[206] The burden related to a broker-dealer's determination of whether paragraph (b) is current and publicly available is discussed below.

alternative to utilizing this exception because current and publicly available information is a condition of the information review requirement in proposed paragraph (a)(1)(ii) and (a)(2)(ii). As a result, this proposed change would not increase the burden of the information review requirement if the unsolicited quotation exception becomes unavailable due to proposed paragraph (f)(2)(ii).

Out of an abundance of caution due to a lack of granular data, the Commission is not reducing the overall burden estimate of the information review requirement as a result of proposed paragraph (f)(6), which would provide an exception from the information review requirement for certain quotations of broker-dealers named as underwriters in the registration statement or offering circular of a security within the time frames contained in proposed paragraphs (b)(1) or (b)(2), as applicable. The Commission believes that no broker-dealer would be required to comply with the information review requirement for quoted OTC securities that meet the requirements of the underwriter exception. While it is estimated that this proposed amendment would result in a slight reduction in the number of times broker-dealers comply with the information review requirement annually, out of an abundance of caution, the Commission has not decreased the overall burden estimates of total annual burdens due to this exception because of a lack of granular data.

	PRA Table 1: Summary of Estimated Burdens Associated with Initial Publication or Submission of a Quotation in a Quotation Medium					
	Type of Issuer	**Type of Burden**	**Initial Burden[207]**	**Number of**	**Annual Burden per Response**	**Total Industry Burden**
Baseline Information Review Requirement Burdens	Information review requirement absent proposed changes[208]					
	Prospectus, Reg. A, or reporting issuers	Recordkeeping and Review	0	91	3	273
	Exempt foreign private issuers	Recordkeeping and Review	0	391	7	2,737
	Catch-all issuers	Recordkeeping and Review	0	56	7	392
Changes to Exceptions	Limiting piggyback exception to both bid and ask quotations at specified prices					
	Prospectus, Reg. A, or reporting issuers	Recordkeeping and Review	0	402	3	1,206
	Exempt foreign private issuers	Recordkeeping and Review	0	187	7	1,309
	Catch-all issuers	Recordkeeping and Review	0	290	7	2,030
	Requiring current and publicly available proposed paragraph (b) information for catch-all issuers to remain piggyback eligible					
	Prospectus, Reg. A, or reporting issuers	Recordkeeping and Review	0	0	0	0
	Exempt foreign private issuers	Recordkeeping and Review	0	0	0	0
	Catch-all issuers	Recordkeeping and Review	0	3,211	7	22,477
	Exception for securities that meet ADTV and asset test (decreases annual burden)					

[207] As mentioned above, it is not expected that the proposed changes to the information review requirement would create any initial one-time burden as it is unlikely that broker-dealers would need to modify their systems or conduct training to comply with the information review requirement under the proposed amendments.

[208] Because the exception for securities that meet the ADTV and asset tests would decrease the annual burden from the 2018 baseline, the numbers in this section of the chart reflect the number of times the information review requirement were conducted in 2018 multiplied by the hourly burden estimate for the completion of the information review requirement.

	Prospectus, Reg. A, or reporting issuers	Recordkeeping and Review	0	2	3	-6
	Exempt foreign private issuers	Recordkeeping and Review	0	0	0	0
	Catch-all issuers	Recordkeeping and Review	0	1	7	-7

2. Other Burden Hours

Some provisions of the proposed amendments would create burdens other than those directly related to the initial publication or submission of a quotation.

Proposed paragraph (d)(2) would require that certain broker-dealers, qualified IDQSs, or registered national securities associations preserve documents and information that demonstrate that the requirements for an exception under proposed paragraph (f) are met. As noted above, rather than specifically direct that market participants would need to document every condition of the basis of their reliance on an exception for each quotation, the proposed Rule instead requires broker-dealers, qualified IDQSs, and registered national securities associations to preserve documents and information "that demonstrate that the requirements for an exception under paragraph (f)" are met. Additionally, proposed paragraph (f)(8) would allow broker-dealers that publish or submit quotations based on an exception to rely on publicly available determinations made by a qualified IDQS or registered national securities association. If a qualified IDQS or registered national securities association makes a publicly available determination that the requirements of an exception are met, or that the proposed paragraph (b) information is current and publicly available, the broker-dealer would need to document only the exception upon which the broker-dealer relies and the name of the qualified IDQS or registered national securities association that made the determination that the requirements of the exception are met.

The types of documentation that a broker-dealer, qualified IDQS, or registered national securities association would need to maintain would vary based upon the exception. Certain exceptions, however, such as the unsolicited quotation exception, and the ADTV value and asset test exception, require that proposed paragraph (b) information be current and publicly available. Additionally, the piggyback exception requires that proposed paragraph (b)(5) information be current and publicly available within six months before the date of publication or submission of a quotation in an IDQS. The Commission believes that the requirement in these exceptions to have current and publicly available proposed paragraph (b) information would create ongoing recordkeeping burdens for broker-dealers under proposed paragraph (d)(2). A proviso to proposed paragraph (d)(2)(ii), however, does not require that a broker-dealer, qualified IDQS, or registered national securities association preserve proposed paragraph (b) information if such information is available on EDGAR. As shown in the Table 3 of the Economic Analysis, there are 9,913 unique issuers of quoted OTC securities for which broker-dealers would be required to maintain records to establish that proposed paragraph (b) information is current and publicly available.[209] Of these 9,913 issuers, 3,320 are SEC/Reg. A/Bank Reporting Obligation issuers, 4,192 are exempt foreign private issuers, and 2,401 are catch-all issuers.[210] It is estimated that it would take one minute to create documentation regarding the determination that the proposed paragraph (b) information is current and publicly available and that broker-dealers, qualified IDQSs, and registered national securities associations would do so quarterly for SEC/Reg.

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[209] This number is determined by adding all unique issuers of quoted OTC securities except for SEC/Reg. A/Bank Reporting obligation issuers with public information available. Broker-dealers would not be required to preserve the required information for SEC/Reg. A/Bank Reporting because the records would be available on EDGAR.

[210] See infra Part VIII.B. for Table 3.

A/bank reporting obligation issuers and foreign private issuers,[211] bi-annually for catch-all issuers.[212] Accordingly, each broker-dealer would spend roughly 581 hours on this task annually, leading to a total annual burden of 52,871 hours dispersed between 89 broker-dealers, one qualified IDQS, and one registered national securities association.[213] The Commission believes that broker-dealers, the qualified IDQS, and the registered national securities association already have systems and personnel in place to create these records, so the initial burden of putting procedures in place to ensure compliance with the proposed amendments would be limited to one annualized hour of internal cost per broker-dealer, qualified IDQS, and registered national securities association to reprogram systems and capture records pursuant to the recordkeeping requirement, leading to an initial burden of 91 hours for the industry. Adding these two together, it is estimated that the total industry-wide burden for this documentation requirement would be 52,962 hours for the first year, and 52,871 hours annually going forward.

Proposed paragraph (f)(2)(ii) eliminates broker-dealers' reliance on the unsolicited quotation exception for certain company insiders if proposed paragraph (b) information is not current and publicly available. Beyond the requirement that proposed paragraph (b) information be publicly available as discussed above, the Commission believes that this proposed amendment

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211 Proposed paragraph (b)(3) provides that the reporting issuer information be the issuer's most recent annual report and periodic or current reports filed thereafter to be considered "current" and made publicly available. Proposed paragraph (b)(4) provides a similar standard, for foreign private issuer information, and requires the information published pursuant to 12g3-2(b) since the beginning of the issuer's last fiscal year. The Commission expects that respondents will preserve records to document compliance with this proposed requirement on a quarterly basis to capture quarterly reporting for these issuers.

212 The proviso in proposed paragraph (f)(3)(ii) would require that the catch-all issuer information be "current" and made publicly available within six months prior to the broker-dealer's submission or publication of a quotation in an IDQS, creating a bi-annual requirement. See supra Part III.A.2.e.

213 (3,320 SEC/Reg. A/Bank Reporting Obligation issuers x 1 minute x 4 responses per year) + (4,192 exempt foreign private issuers x 1 minute x 4 responses per year) + (2,401 catch-all issuers x 1 minute x 2 responses per year) = 581 hours.

would create ongoing recordkeeping burdens for broker-dealers relying on the unsolicited quotation exception. Based on data from OTC Markets Group, there were 3,043,214 quotations published in reliance on the unsolicited quotation exception in 2018. Although there is current and publicly available information for many issuers of securities involving unsolicited customer order quotations, out of an abundance of caution the Commission is including all unsolicited customer quotations in its estimate and estimating that the number would remain consistent on an annual basis for the purpose of this analysis. Therefore, it is estimated that there would be 3,043,214 quotations published in reliance on the unsolicited quotation exception annually that would require documentation and information to demonstrate that the quotation is not by or on behalf of an insider.

It is estimated that it would take a broker-dealer approximately one minute to create a record regarding such unsolicited customer quotation. Accordingly, it is estimated that, after rounding, broker-dealers would spend roughly 50,720 hours[214] in the aggregate complying with this recordkeeping requirement annually. These 50,720 hours would be dispersed between 89 broker-dealers, leading to an annual burden of 570 hours per broker-dealer.[215] The Commission believes that broker-dealers would already have systems and personnel in place that they would use to create these records, so the initial burden of putting procedures in place to ensure compliance would be limited to three hours of internal cost per broker-dealer to reprogram systems and capture the record, leading to an initial burden of 267 hours for the industry. [216]

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214 (3,043,214 quotations x 1 minute) / 60 minutes= 50,720 hours.

215 50,720 hours / 89 broker-dealers = 570 hours.

216 The Commission notes that Supplemental Material .01 to FINRA Rule 6432 requires that broker-dealers initiating or resuming quotations in reliance on the exception provided by Rule 15c2-11(f)(2) (i.e., the unsolicited

Adding these two together, it is estimated that the total industry-wide burden for this documentation requirement would be 50,987 hours for the first year, and 50,720 hours annually going forward.

The proviso in proposed paragraph (f)(3)(ii) would eliminate eligibility for the piggyback exception for securities of issuers that are shell companies. Accordingly, to comply with the recordkeeping requirement in proposed paragraph (d)(2), each broker-dealer, qualified IDQS, and registered national securities association that is relying on, or making publicly available determinations that a broker-dealer may rely on, the piggyback exception would need to preserve documents and information regarding its determination that the issuer of a security is not a shell company. The Commission estimates that broker-dealers, qualified IDQSs, and registered national securities associations would make determinations regarding shell companies quarterly and rely on the quarterly review for all quotations submitted concerning a particular issuer.[217]

The Commission estimates that broker-dealers, qualified IDQSs, and registered national securities associations would each spend one minute making a determination and preserving documents and information that demonstrate that an issuer of the OTC security is not a shell

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(footnote continued)
quotation exception) must be able to demonstrate eligibility for the exception by making a contemporaneous record of (1) the identification of each associated person who receives the unsolicited customer order or indication of interest directly from the customer, if applicable; (2) the identity of the customer; (3) the date and time the unsolicited customer order or indication of interest was received; and (4) the terms of the unsolicited customer order or indication of interest that is the subject of the quotation (e.g., security name and symbol, size, side of the market, duration (if specified) and, if priced, the price). Accordingly, based on this FINRA recordkeeping requirement, the Commission believes that broker-dealers will already have systems in place to document information related to the unsolicited quotation exception.

[217] As discussed above, proposed paragraph (d)(2) would require broker-dealers, qualified IDQSs, and registered national securities associations only to preserve documents and information "that demonstrate that the requirements for an exception under paragraph (f)" are met. Accordingly, the Commission believes that broker-dealers may likely document the availability of this exception quarterly, but they may do so more or less often in practice.

company. As noted in the Economic Analysis, there are 10,167 quoted OTC securities.[218] Accordingly, each broker-dealer would spend roughly 678 hours[219] on this task annually, leading to a total annual burden of 60,342 hours dispersed between 89 broker-dealers, one qualified IDQS, and one registered national securities association. The Commission believes that broker-dealers already have systems and personnel in place to create these records, so the initial burden of putting procedures in place to ensure compliance with the proposed amendments would be limited to three hours of internal cost per broker-dealer, qualified IDQS, and registered national securities association leading to an initial burden of 273 hours for the industry to reprogram systems and capture the record. Adding these two together, it is estimated that the total industry-wide burden for this documentation requirement would be 60,615 hours for the first year, and 60,342 hours annually going forward.

As noted above, it is estimated that there would be approximately 37 securities that would meet the proposed paragraph (f)(5) ADTV and asset tests. Beyond preserving documents and information that demonstrate proposed paragraph (b) information is current and publicly available, as discussed above, the broker-dealer, qualified IDQS, or registered national securities association would need to preserve documents and information that demonstrate that the various requirements of the ADTV test and asset test have been met. It is estimated it would take one minute to create documentation supporting the broker-dealer's reliance on the asset test prong of

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[218] Some broker-dealers may not provide quotations for all OTC securities; however, as a conservative estimate, the Commission estimates that each broker-dealer would determine the shell status of each issuer of a quoted OTC security on a bi-annual basis.

[219] 10,167 securities x 1 minute x 4 responses per year.

the exception and that broker-dealers would do this once annually per issuer.[220] Accordingly, broker-dealers, qualified IDQSs, and registered national securities associations would spend roughly 0.62 hours[221] on this information collection annually, leading to an ongoing burden of roughly 56.5 hours dispersed between 89 broker-dealers, one qualified IDQS, and one registered national securities association after rounding. Additionally, the Commission estimates that it would take one minute for a broker-dealer, qualified IDQS, or registered national securities association to preserve documents and information that demonstrate that the requirements of the ADTV test have been met and that each respondent would do this 252 times a year, each trading day. Accordingly, each respondent would spend roughly 155.4 hours[222] on this information collection annually leading to an ongoing burden of 14,141 hours dispersed between 89 broker-dealers, one qualified IDQS, and one registered national securities association (after rounding). The Commission believes that broker-dealers, the qualified IDQS, and the registered national securities association would already have systems and personnel in place to create these records, so the initial burden of putting procedures in place to ensure compliance would be limited to three hours of internal cost per broker-dealer, qualified IDQS, and registered national securities association, leading to an initial burden of 273 hours for the industry to reprogram systems and capture the record. Adding these values together, it is estimated that, after rounding, the total

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220 As discussed above, proposed paragraph (d)(2) would require broker-dealers, qualified IDQSs, and registered national securities associations only to preserve documents and information "that demonstrate that the requirements for an exception under paragraph (f)" are met. Accordingly, the Commission believes that broker-dealers would likely document the availability of this exception annually because the test is based on audited balance sheets issues within six months of the end of the most recent fiscal year.

221 37 securities x 1 minute.

222 252 x 37 securities x 1 minute.

industry-wide requirement would be 14,414 hours for the first year, and 14,141 hours annually going forward.

Proposed paragraph (f)(6) would except from the information review requirement quotations concerning a security by a broker-dealer that is named as underwriter in a security's registration statement referenced in proposed paragraph (b)(1) or in an offering circular referenced in proposed paragraph (b)(2), subject to the time limitations contained in those sections. Registration statements and offering circulars are filed in EDGAR. Since the proviso to proposed paragraph (d)(2)(ii) would not require broker-dealers to preserve proposed paragraph (b) information that is available on EDGAR, the Commission is not estimating any initial or ongoing burden with respect to this exception.

Proposed paragraph (f)(7) would except from the Rule's issuer information and review and document collection provisions in proposed paragraphs (a) through (c), and (d)(1), the publication or submission, in a qualified IDQS, of a quotation concerning a security where that qualified IDQS complies with the requirements of proposed paragraphs (a) through (c) of the proposed Rule. Any broker-dealer would be able to publish or submit quotations for such security and would be required to document the reliance on this exception under proposed paragraph (d)(2). It is unclear how many securities would be eligible for this exception. As discussed above, this proposed exception is intended to except certain securities from the information review requirement that are less likely to be targeted for fraudulent activity (e.g., securities of large cap foreign issuers). The Commission conservatively estimates that qualified IDQSs would conduct the required review for five percent of the exempt foreign private issuers

that are quoted OTC securities[223] and that each broker-dealer would document its reliance on the exception once per year per issuer.[224] The information required to document compliance with the exception would be publicly available, so the Commission estimates that each broker-dealer would spend approximately one minute creating each record. Accordingly, broker-dealers would spend roughly 0.33 hours[225] on this information collection annually leading to an ongoing burden of 30 hours dispersed between 89 broker-dealers (after rounding). The Commission believes that broker-dealers would already have systems and personnel in place to create these records, so the initial burden of putting procedures in place to ensure compliance with the proposed amendments would be limited to three hours of internal cost per broker-dealer leading to an initial burden of 267 hours for the industry to reprogram systems and capture the record. Adding these two together, it is estimated that the total industry-wide burden for this documentation requirement would be 297 hours for the first year, and 30 hours annually going forward.

Under the proposed amendments, proposed paragraph (f)(8) would be contingent upon the qualified IDQS or registered national securities association representing that it has reasonably designed written policies and procedures to determine whether proposed paragraph (b) information is publicly available and current and the requirements of an exception under proposed paragraph (f) of this section are met. Accordingly, these entities would be required to

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223 According to FINRA Form 211 data, broker-dealers complied with the information review requirement 391 times for exempt foreign private issuers, five percent of which, after rounding, is 20 issuers. The Commission believes that, given the relatively large number of foreign issuers of quoted OTC securities, five percent is a reasonable estimate for the proportion of securities that would be reviewed by qualified IDQSs.

224 Under this proposed exception, the security can become eligible for the piggyback exception after 30 days and, at this point, broker-dealers would not be required to document reliance on proposed paragraph (f)(7). The Commission, therefore, estimates that the securities that are quoted under this exception would either become eligible for the piggyback exception or would not be eligible for quotations for the remainder of the year given the lack of interest in the market.

225 20 issuers x 1 minute = 20 minutes or 0.33 hours.

update their written policies and procedures to make this representation. The Commission estimates that it would take one qualified IDQS and one registered national securities association subject to the Rule approximately 18 hours of initial burden each to initially prepare these written policies and procedures, and an ongoing annual burden of 10 hours each to review and update policies and procedures. Given the sophistication of the qualified IDQS and the registered national securities association, the Commission estimates that this burden would be borne internally. Accordingly, the total industry-wide burden for this documentation requirement would be 56 hours for the first year, and 20 hours annually going forward.

Proposed paragraphs (f)(1) and (f)(4) are exceptions for quotations concerning a security admitted to trading on a national securities exchange and which is traded on such an exchange on the same day as, or on the business day immediately preceding, the day of the quote and the publication or submission of a quotation concerning a municipal security, respectively. The Commission is not estimating any initial or ongoing burden with respect to these exceptions because the proviso to proposed paragraph (d)(2) does not require broker-dealers, qualified IDQSs, or registered national securities association to preserve records under paragraph (d)(2) for the proposed paragraphs (f)(1) or (f)(4) exceptions.

PRA Table 2:
Summary of Estimated Other Burdens

Requirement	Type of Burden	Number of Entities Impacted	Total Initial Industry Burden	Total Annual Industry Burden
Recordkeeping when relying on an exception under proposed paragraph (f), that proposed paragraph (b) information is current and publicly available	Recordkeeping	91	273	52,871
Recordkeeping obligations under unsolicited quotation exception under proposed paragraph (f)(2)	Recordkeeping	89	267	50,720
Recordkeeping obligations concerning determining shell status under the proviso in proposed paragraph (f)(3)(ii))	Recordkeeping	91	273	60,342

Recordkeeping obligations for the exceptions under proposed paragraph (f)(5) – Asset Test	Recordkeeping	91	273	56.5
Recordkeeping obligations for the exceptions under proposed paragraph (f)(5) – ADTV Test	Recordkeeping	91	0	14,141
Recordkeeping obligations concerning reliance on an IDQS under proposed paragraph (f)(7)	Recordkeeping	89	267	30
Recordkeeping obligations related to the creation of reasonable Policies under proposed paragraph (f)(8)	Recordkeeping	2	36	20

3. Collection of Information is Mandatory

The information collections for the information review requirement and recordkeeping requirement are mandatory under the proposed amendments if a broker-dealer wishes to provide the initial publication or submission of a quotation for an OTC security. Additionally, the information collections involving documentation and information that demonstrate that the requirements for an exception have been met are mandatory under the proposed amendments if a broker-dealer submits or publishes quotations that rely on an exception in proposed paragraph (f).

4. Confidentiality

The Commission would not typically receive confidential information as a result of this collection of information. The collection of information is expected to be, for the most part, publicly available information. To the extent that the Commission receives records related to such disclosures or other records from a qualified IDQS or registered broker-dealer that are not publicly available concerning the information review requirement through the Commission's examination and oversight program, through an investigation, or some other means, such information would be kept confidential, subject to the provisions of an applicable law. To the extent that the Commission receives records that are not publicly available from a qualified IDQS, registered national securities association, or registered broker-dealer concerning the records related to a reliance on an exception contained in proposed paragraph (f) of the proposed

Rule through the Commission's examination and oversight program, or through an investigation, or some other means, such information would be kept confidential, subject to the provisions of applicable law.

5. Retention Period of Recordkeeping Requirement

Pursuant to proposed paragraph (d)(1), a broker-dealer publishing or submitting a quotation, or a qualified IDQS that makes known to others the quotation of a broker-dealer pursuant to proposed paragraph (a)(2), shall preserve the documents and information for a period of not less than three years, the first two years in an easily accessible place. Pursuant to proposed paragraph (d)(2), a broker-dealer publishing or submitting a quotation, or a qualified IDQS or a registered national securities association that make a publicly available determination pursuant to proposed paragraph (f)(8) shall preserve the documents and information for a period of not less than three years, the first two years in an easily accessible place.

D. Request for Comment

The Commission requests comment on whether the estimates for burden hours and costs are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) determine whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

Q134. Is the burden associated with the review required to comply with the information review requirement generally, and, in particular, whether three hours for reporting issuers and seven hours for exempt foreign private and catch-all issuers is reasonably accurate?

Q135. Is the Commission adequately capturing the respondents that would be subject to the burdens under the proposed Rule? Are there more than 39, or fewer than 39, broker-dealers that conduct the required review to provide the initial publication or submission of a quotation? Are there more than 89, or fewer than 89, broker-dealers that publish or submit quotations in reliance on exceptions to the Rule?

Q136. What is the impact of the proposed amendments on the number of times broker-dealers would comply with the information review requirement?

Q137. What are any other hourly burdens associated with complying with the proposed amendments?

Q138. Would any of the proposed amendments that are not discussed in this PRA Analysis impact the burden associated with the collection of information?

Persons wishing to submit comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and send a copy to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-1090, with reference to File No. S7-14-19. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is

best assured of having its full effect if OMB receives it within 30 days of publication. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-14-19, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street, NE, Washington, D.C. 20549-2736.

VIII. Economic Analysis

A. Background

The proposed amendments are intended to better protect retail investors from incidents of fraud and manipulation in OTC securities, particularly securities of issuers for which there is no or limited publicly available information. These amendments are also intended to reduce regulatory burdens on broker-dealers for publication of quotations of certain OTC securities that may be less susceptible to potential fraud and manipulation, such as securities of certain issuers with higher capitalization and securities that were issued in offerings underwritten by the broker-dealer publishing a quote.

The Commission is mindful of the costs imposed by and the benefits obtained from the Commission's rules. Exchange Act Section 3(f) requires the Commission, when engaging in rulemaking that requires consideration or determination of whether an action is necessary or appropriate in the public interest, also to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Additionally, Exchange Act Section 23(a)(2) requires the Commission, when adopting rules under the Exchange Act, to consider the impact that any new rule will have on competition and not to adopt any rule that will impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The discussion below addresses the expected economic effects of the proposed amendments, including the likely benefits and costs, as well as the likely effects of the proposed amendments on efficiency, competition, and capital formation. The Commission has, where possible, quantified the economic effects that are expected to result from the proposed amendments in the analysis below. However, the Commission is unable to quantify some of the potential effects discussed below.

First, it is unclear to what extent publicly available proposed paragraph (b) information would influence retail investors' investment decisions and how these decisions might affect the welfare of these investors.[226] In addition, the Commission is unable to estimate certain costs with precision because it lacks data on the costs associated with making proposed paragraph (b) information publicly available as well as the degree of activity and concentration in this market by individual broker-dealers with respect to initiating, resuming, or piggybacking quotes.[227] Wherever possible, where more precise estimates were not feasible, the Commission has estimated a range or bound associated with the costs of the proposed amendments. In addition, the Commission lacks information required to predict the extent to which a qualified IDQS will satisfy the information review requirement under the proposed amendments to the Rule or the extent to which a qualified IDQS or a national securities association will make publicly available a determination about the characteristics of OTC securities and whether broker-dealers can rely

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[226] For example, the effect of investment decisions on the welfare of the investor depends on the individual's preference for risk and return. The Commission lacks data not only on the effect of disclosure on investment decisions, but also the preferences of OTC investors.

[227] For example, the Commission lacks data on the degree to which OTC issuers are already producing proposed paragraph (b) information that is current but not disseminating it to the public, which would reduce the costs associated with the proposed disclosure requirements. In addition, the Commission lacks data on which broker-dealers are publishing specific quotes; much of the analysis in this release is done at the security or issuer-level.

on the proposed exceptions to the Rule. Lastly, the Commission is unable to quantify the extent to which the proposed amendments to the Rule would impact entry of issuers into the quoted OTC market or the migration between securities in the quoted OTC market and the grey market, in which trades in OTC securities occur without broker-dealers publishing quotations in a quotation medium. Therefore, much of the discussion below is qualitative in nature, although the Commission describes, where possible, the direction of these effects.

B. Baseline and Affected Parties

The proposed amendments would affect broker-dealers that publish or submit quotations for OTC securities. Besides broker-dealers and qualified IDQSs, affected parties include issuers of quoted OTC securities and investors in these securities. The Commission assesses the economic effects of the proposed amendments relative to the baseline of existing requirements and practices in the OTC market. Registered broker-dealers participate in the market for quoted OTC securities by publishing priced and unpriced quotations representing customer interest in trading, executing customer orders, and acting as market makers.[228] OTC Markets Group identifies 89 broker-dealers that are active on the OTC Link ATS in OTC securities.[229] Thirty-two broker-dealers filed at least one FINRA Form 211 in order to initiate the publication or submission of quotations for an OTC security during the calendar year 2018.[230]

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[228] In addition to the Rule, the regulatory baseline includes SRO rules governing the process of broker-dealers' publication of quotations for OTC securities. In particular, FINRA Rule 6432 requires broker-dealers to file Form 211 when initiating or resuming quotations in OTC securities to ensure compliance with the information requirements of the Rule. See supra Part III.J.1.

[229] See Broker-Dealer Directory, OTC Mkts. Grp. Inc. (last visited Aug. 13, 2019, 11:06 AM), https://www.otcmarkets.com/otc-link/broker-dealer-directory. The Commission expects that some of the broker-dealers included in the directory are not actively engaged in quoting OTC securities.

[230] The average annual level of FINRA Form 211 filing activity for the 32 broker-dealers was approximately 14 OTC securities during 2018. This activity is associated with initiating or resuming quotations only. The

Securities quoted on the OTC market differ from those listed on national securities exchanges. In particular, the average OTC security issuer is smaller, and these securities trade less, on average. Table 1 below compares quoted OTC securities to those listed on the New York Stock Exchange (NYSE) or Nasdaq.[231] On average, issuers of quoted OTC securities have a lower market capitalization than those with securities that are listed on a national stock exchange.[232] Panel B of Table 1 shows that this difference is more pronounced when companies with securities listed on foreign exchanges, such as the Tokyo Stock Exchange or the TSX Venture Exchange, are excluded from the sample of quoted OTC securities. Further, Table 1 demonstrates that quoted OTC securities are characterized by significantly lower dollar trading volumes than listed stocks, even when comparing securities of similar size as measured by market capitalization.[233]

(footnote continued)
Commission lacks data that would allow it to estimate the number of quotes that broker-dealers published pursuant to paragraph (a) or in reliance on the piggyback exception, national securities exchange, or municipal security exceptions to the Rule. Based on data from OTC Markets Group, broker-dealers published 3,043,214 quotations in reliance on the unsolicited order exception in 2018. See supra note 227 for a discussion of data limitations. Because broker-dealers could rely on the piggyback exception for the vast majority (91 percent) of quoted OTC securities on an average day during 2018, the Commission believes that it is reasonable to assume that the majority of quotes that broker-dealers published during 2018 relied on the piggyback exception. See infra Part VIII.B for Table 2, which describes average daily activity for securities that are quoted in the OTC market.

[231] See infra note 234 for a description of OTC securities data sources. All information for stocks listed on NYSE and Nasdaq comes from The Center for Research in Security Prices (CRSP). Statistics are computed by averaging market capitalization and trading volume for each security across all trading days during the calendar year 2018. The conclusions drawn from this analysis regarding how OTC securities compare to exchange-listed securities with respect to size and volume traded remain qualitatively unchanged if the Commission extends the analysis to include securities listed on additional smaller national exchanges.

[232] The Commission estimates that securities listed on NYSE and Nasdaq were valued at approximately $34.9 trillion in total during calendar year 2018, while quoted OTC securities were valued at approximately $33.6 trillion with 95.3 percent of the total market capitalization coming from companies that also have securities listed on public foreign exchanges.

[233] Total dollar volume is annualized by taking the average daily trading volume and multiplying it by the number of trading days in 2018. Panels C and E of Table 1 provide statistics for comparable samples of quoted OTC and exchange listed securities with a market capitalization between $50 million and $5 billion. Several academic studies document the differences in liquidity between OTC and listed stocks using older data. See Bjorn

Table 1—Comparison of Quoted OTC Securities and Listed Securities, CY 2018

	Quoted OTC			Exchange Listed	
	(A) All	(B) Unlisted	(C) $50M-$5B Market Cap	(D) All	(E) $50M-$5B Market Cap
Market Cap - median ($M)	22.12	3.78	444.39	581.20	528.66
Market Cap - mean ($M)	3,707.35	328.53	1,130.74	5,818.03	1,031.08
Volume - median ($M)	0.34	0.17	0.98	891.16	761.85
Volume - mean ($M)	76.18	86.27	39.75	11,422.17	2,737.79
Number of Securities	**11,534**	**6,906**	**2,655**	**6,125**	**4,348**

Table 2 provides more detail on the characteristics of quoted OTC securities and their issuers for the 2018 calendar year.[234] The Commission estimates that, on average, 10,167 quoted OTC securities had published quotations per day during the calendar year 2018.[235] A majority of

(footnote continued)
Eraker & Mark Ready, Do Investors Overpay for Stocks with Lottery-Like Payoffs? An Examination of the Returns of OTC Stocks, 115 J. Fin. Econ. 486–504 (2015); Andrew Ang et al., Asset Pricing in the Dark: The Cross-Section of OTC Stocks, 26 Rev. Fin. Studs. 2985–3028 (2013).

[234] The Commission uses three sources of data on OTC securities. OTC Markets Group's "End-of-Day Pricing Service" and "OTC Security Data File" provide closing trade and quote data for the U.S. OTC equity market and include identifying information for securities and issuers, as well as securities' piggyback eligibility. The Commission also uses information from the weekly OTC Markets Group's "OTC Company Data File." Company Data Files include information about issuer reporting, shell, and bankruptcy status, as well as the SEC Central Index Key (CIK) identifier and whether an issuer's financial statements are audited.

All statistics in Table 1 represent characteristics of OTC securities and OTC issuers on a typical trading day and are computed by averaging across all trading days for the 2018 calendar year. The Commission identified 18,964 unique OTC securities for 15,851 unique companies from aggregated OTC Markets Group data for the calendar year 2018. Of these, 11,534 unique OTC securities had at least one published quotation and 9,913 unique companies had a security that was quoted at least once during the calendar year 2018. The Commission believes that OTC Markets Group data are reasonably representative of all OTC quoting and trading activity in the U.S.

[235] The number of securities quoted includes those with published priced and unpriced quotations. The Commission estimates that approximately five percent of quoted OTC securities did not have priced quotations. The number of OTC securities quoted on an average day is lower than the total number of OTC securities with published quotations in 2018 because some securities did not have published quotations for every trading day in 2018.

these had published both bid and ask quotations (88 percent).[236] The Commission identified that broker-dealers could rely on the piggyback exception to publish or submit quotations for 91 percent of these quoted OTC securities.[237] Many quoted OTC securities are illiquid. For example, the Commission estimates that, on average, only 43 percent of these quoted securities reported a positive daily trading volume, with three percent of quoted securities being "inactive," which the Commission defines as not having reported any trading volume within the last year.[238] Conversely, only nine percent of quoted securities had an ADTV value greater than $100,000.[239]

Table 2—Market for Quoted OTC Securities, CY 2018

Average Daily Activity

Number of Securities	**10,167**
Quotes with both Bid and Ask	88%
Piggyback Eligible	91%
Traded	43%
Inactive	3%
ADTV value > $100,000	9%

[236] The Commission estimates the number of securities with quotations with both bid and ask prices from close of trading day data. This estimate is a lower bound as the Commission is not able to identify cases in which a security had a published two-sided quotation during the day but was no longer published at day close.

[237] See supra Part III.C. A security would qualify for the piggyback exception if it satisfies the frequency of quotation requirements pursuant to proposed paragraph (f)(3) of the Rule. For such securities, a broker-dealer would not need to comply with the Rule's information review requirement prior to publishing a quotation on an IDQS.

[238] Broker-dealers trading in quoted OTC securities are required to report their trades to FINRA, which then disseminates this information to the market. OTC Markets Group receives trading data from FINRA's Trade Data Dissemination Service (TDDS) feed and incudes aggregated daily trading volume data for OTC securities in the "End-of-Day Pricing Data File."

[239] The Commission computes the ADTV on a given day by taking the average of reported dollar trading volume over the previous 60 calendar days. The computed ADTV for each security is a lower bound estimate of its worldwide ADTV if some of the trading activity was not reported to FINRA. As such, it is possible that there were more securities than the Commission identifies that would satisfy the volume threshold. The Commission estimates that approximately eight percent of quoted securities had an ADTV value greater than $100,000 and current and publicly available information.

Some OTC securities are traded on the grey market. Broker-dealers might not publicly quote these securities due to a lack of available issuer information necessary to satisfy the information review requirement or due to insufficient investor interest. The Commission estimates that 5,155 OTC securities were traded at some point during 2018 without having published quotations, with 522 securities of 517 issuers traded on the grey market on average per day during 2018. Despite not having published quotations, some grey market OTC securities were actively traded, with two percent having an ADTV value greater than $100,000.[240] Table 3 below provides detail on issuers of quoted OTC securities.[241] The Commission estimates that, brokers participating in the OTC market published quotations for the securities of 9,913 issuers during the calendar year 2018.[242] These issuers differed in regulatory status, which determines the information issuers need to provide to comply with securities regulations and the type of proposed paragraph (b) information that would be required to be publicly available by the proposed amendments. Thirty-three percent of issuers followed the Exchange Act, Regulation A, or the U.S. Bank reporting standards; 42 percent followed the international reporting standard; and the remaining 24 percent followed an alternative reporting standard.[243] Given that issuers of

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[240] Conditional on having been traded, the average (median) dollar trading volume on a given day during 2018 for a security trading on the grey market was $40,301 ($1,257) as compared to $336,902 ($4,798) for quoted OTC securities.

[241] See supra note 234 for information on data sources. Numbers in parenthesis represent percentages of the row totals.

[242] During the 2018 calendar year, 14 percent of issuers of quoted OTC securities had multiple (two or more) quoted OTC securities with published quotations.

[243] The Exchange Act reporting standard requires that issuers are in compliance with their SEC reporting requirements. The Regulation A reporting standard applies to companies subject to reporting obligations under Tier 2 of Regulation A under the Securities Act. These companies must file annual, semi-annual, and other interim reports on EDGAR. The U.S. Bank reporting standard applies to companies in the OTCQX U.S. Bank Tier on OTC Markets Group's system and may be satisfied by following the SEC reporting standards, Regulation A reporting standards, or reporting standards outlined in OTCQX Rules for U.S. Banks

quoted OTC securities follow different reporting standards, current financials are available for some issuers but not others. The Commission estimates that current financials were publicly available for approximately 68 percent of issuers of quoted OTC securities.[244] In particular, a total of 3,211 issuers of quoted OTC securities did not disclose information publicly. Of these, 1,146 issuers had an obligation to disclose information under the Exchange Act, Regulation A, or the U.S. Bank reporting standards; 111 issuers had an obligation under an international reporting standard; and the remaining 1,954 issuers did not have a reporting or disclosure obligation. Although the majority of issuers of quoted OTC securities provided current financial information publicly, financial statements of these issuers are not always audited. The Commission estimates that only 48 percent of issuers with publicly available financial statements with quoted OTC

(footnote continued)
(https://www.otcmarkets.com/files/OTCQX_Rules_for_US_Banks.pdf). Foreign issuers that are exempt from registering a class of equity securities under Section 12(g) of the Exchange Act pursuant to Rule 12g3-2(b) follow international disclosure requirements. Lastly, the alternative reporting standard, which could apply to all remaining OTC security issuers and is based on the information required by Rule 15c2-11(a)(5), has varying requirements for disclosure depending on the OTC Markets Group Tier in which quotations for the security are published.

The Commission observed several instances in which issuers of quoted OTC securities changed their reporting standard during 2018. In these instances, for the computation of statistics in Table 3, the Commission attributed a reporting standard that the issuer followed for the majority of the days that its securities had published quotations during 2018.

[244] See supra note 234 for information on data sources. The Commission uses information on the IDQS and the OTC Markets Group tier classification to estimate the number of issuers with current and publicly available disclosures. In particular, the Commission counts all issuers with securities quoted on OTC Bulletin Board ("OTCBB") and specific tiers on OTC Markets Group's system: OTCQX, OTXQB, and OTC Pink: Current Information and OTC Pink: Limited Information. This includes all quoted securities other than in the OTC Market OTC Pink: Limited Information and OTC Pink: No Information tiers. OTC Bulletin Board requires that quoted securities are current in their required filings with the SEC or other federal regulatory authority with proper jurisdiction. All OTC Markets Group tiers other than OTC Pink: Limited Information and OTC Pink: No Information require financial information to be at most six months old and available on www.otcmarkets.com or on the Commission's EDGAR system. The number the Commission computes here is a rough estimate as it is possible that some issuers of securities in the OTC Pink: Limited Information or OTC Pink: No Information tiers voluntarily release current and public information somewhere other than on the OTC Markets Group platform. Of all the quoted securities that qualified for the piggyback exception in calendar year 2018, the Commission estimates that 68 percent of them had publicly available current disclosures.

securities that were quoted in 2018 provided audited financial statements.[245] Four percent of issuers with quoted OTC securities were shell companies, and broker-dealers were able to rely on the piggyback exception to publish or submit quotations for nearly all securities of shell companies (99 percent).[246] Lastly, the Commission estimates that 1,032 (10 percent) of issuers with quoted OTC securities and current and publicly available information had total assets greater than $50 million and shareholder equity greater than $10 million on their most recent audited balance sheets.[247]

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[245] OTC Markets Group classifies issuers that provide audited financial statements. In the analysis, the Commission assumes that all issuers that have been identified as providing audited financial statements provide audited balance sheets.

Although current FINRA and Commission rules do not require the financial statements of non-SEC reporting OTC securities issuers to be audited, OTC Markets Group requires audited financials from OTC issuers with securities quoted in the OTCQX U.S.® and OTCQB® tiers. Issuers with securities quoted in the OTC Pink: Current Information tier must provide an Attorney Letter with Respect to Current Information if they do not file with the SEC and do not publish audited financial information.

[246] See supra Part III.C.2.d for a detailed discussion of shell companies. Even though broker-dealers had the ability to publish quotes for these securities relying on the piggyback exception, some quotes broker-dealers published for these securities may have relied on other exceptions to the Rule.

[247] The Commission reviews information on assets and shareholder equity of OTC issuers from a combination of four sources: (1) quarterly and annual filings in EDGAR, (2) S&P Global Market Intelligence Compustat North America and Compustat Global databases, (3) Bloomberg, and (4) the OTC Markets Group website (https://www.otcmarkets.com). The Commission uses data on the most recent financial information available, as the Commission does not have access to historical financial data for many issuers. In some cases, the most recent financial data available is outdated. Specifically, for approximately 28 percent of OTC issuers, for which the Commission has data, the financial data are from calendar year 2017 or earlier. Of the 15,851 unique OTC issuers that appear in the data for calendar year 2018, the Commission is able to draw financial data for 1,806 (11 percent) of them from EDGAR and Compustat, 10,333 (65 percent) from Bloomberg, and 1415 (nine percent) from the OTC Markets Group website. The Commission is unable to collect financial information for 2,297 (14 percent) of OTC issuers because financial statement information for these issuers was absent in the four data sources the Commission checked.

The Commission is only able to observe total shareholder equity and not affiliated shareholder equity on the balance sheets of issuers of quoted OTC securities. Since total shareholder equity serves as an upper bound on affiliated shareholder equity, the number of issuers with affiliated shareholder equity greater than $10 million must be no greater than the number of issuers with total shareholder equity greater than $10 million.

Table 3—Issuers of Quoted OTC Securities, CY 2018[248]

	SEC/ Reg. A/ Bank Reporting Obligation	International Reporting Obligation	No Reporting/ Disclosure Obligation	**Total**
		Public Information Available		
	(A)	(B)	(C)	
Issuers	2,174 (32.44)	4,081 (60.89)	447 (6.67)	**6,702**
Securities	2,522 (30.71)	5,201 (63.33)	489 (5.95)	**8,212**
Shell Company	192 (88.48)	1 (0.46)	24 (11.06)	**217**
Audited Financials	1,921 (59.58)	1,144 (35.48)	159 (4.93)	**3,224**
Assets > $50 mil & SE > $10mil	578 (56.01)	438 (42.44)	16 (1.55)	**1,032**
		No Public Information Available		
	(D)	(E)	(F)	
Issuers	1,146 (35.69)	111 (3.46)	1,954 (60.85)	**3,211**
Securities	1,179 (35.49)	121 (3.64)	2,022 (60.87)	**3,322**
Shell Company	136 (66.67)	0 (0.00)	68 (33.33)	**204**
		Total (by Reporting Status)		
Issuers	3,320 (33.49)	4,192 (42.29)	2,401 (24.22)	**9,913**
Securities	3,701 (32.09)	5,322 (46.14)	2,511 (21.77)	**11,534**

The OTC market may attract those seeking to engage in fraudulent practices, such as pump-and-dump schemes, due to a lack of publicly available current information about certain issuers of quoted OTC securities. Two academic studies have found that market manipulation and pump-and-dump cases are concentrated among issuers of OTC securities relative to

[248] See supra note 234 for information on data sources. The Commission observes that issuers of OTC securities that trade on the grey market differ from issuers of quoted OTC securities. The majority of these issuers followed the alternative reporting standard (69 percent) and a few (one percent) were identified as shell companies. In addition four percent of these issuers had total assets greater than $50 million and shareholder equity greater than $10 million on their most recent audited balance sheets.

exchange-listed securities.[249] Another study has highlighted a higher incidence of cases involving delinquent filings and pump-and-dump schemes brought against issuers of OTC securities relative to cases brought against issuers of exchange-listed securities.[250] A Commission staff analysis of 4,000 SEC litigation releases between 2003 and 2012 found that the majority of alleged violations involving issuers of OTC securities were primarily classified as reverse mergers of shell companies or as market manipulation.[251] In addition, the Commission estimates, from a sample of 226 Commission enforcement actions filed in fiscal years 2017 and 2018 involving 502 OTC securities, that 171 enforcement actions (76 percent) were classified as involving delinquent filings and seven enforcement actions (three percent) were classified as involving market manipulation. In contrast, the Commission estimates, from a sample of 68 Commission enforcement actions filed in fiscal years 2017 and 2018 involving listed securities, that one enforcement action (two percent) was classified as involving delinquent filings and three enforcement actions (five percent) were classified as involving market manipulation.

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[249] One study analyzed 142 stock manipulation cases, including pump-and-dump cases, in SEC litigation releases from 1990 to 2001 and found that that 48 percent involved OTC securities, while 17 percent involved securities listed on national exchanges. See Aggarwal & Wu, supra note 22. A more recent study looked at 150 pump-and-dump manipulation cases between 2002 and 2015 and found that 86 percent of these cases involved OTC securities. See Renault, supra note 22.

[250] This study looked at a broader sample of securities cases filed between January 2005 and June 2011 and identified 1,880 cases involving OTC securities and 1,157 cases involving securities listed on exchanges in the United States. The majority of OTC securities cases, 1,148 (61 percent), were related to delinquent filings, while 151 (eight percent) were related to a pump-and-dump scheme, 159 (eight percent) were related to financial fraud, 12 (one percent) were related to insider trading, and 212 (11 percent) were related to other fraudulent misrepresentation or disclosure. In contrast, only 26 (two percent) of listed securities cases involved delinquent filings, 43 (four percent) involved pump-and-dumps, 278 (24 percent) involved financial fraud, 399 (34 percent) involved insider trading, and 173 (15 percent) involved other fraudulent misrepresentation or disclosure. See Cumming & Johan, supra note 23.

[251] See Spotlight on Microcap Fraud (Feb. 22, 2019), https://www.sec.gov/spotlight/microcap-fraud.shtml.

To highlight characteristics of securities and issuers in the OTC market that tend to involve risk of fraud and manipulation, the Commission examined quoted OTC securities that had been the subject of Commission-ordered trading suspensions and those that have been assigned a "caveat emptor" designation by OTC Markets Group during the 2018 calendar year.[252] The Commission summarizes the findings below, in Table 4.[253]

Table 4—Quoted OTC Securities, Suspensions and OTC Markets Group "Caveat Emptor" Status, CY 2018

	SEC Suspensions		**OTC Markets Group "Caveat Emptor" Status**	
Issue Characteristics				
Number of Securities	**318**		**357**	
Multiple Broker-Dealers Quoting	296	(93%)	336	(94%)
Quotes with both Bid and Ask	270	(85%)	309	(87%)
Piggyback Eligible	315	(99%)	354	(99%)
Issuer Characteristics				
Number of Issuers	**315**		**349**	
SEC/Reg. A/ Bank Reporting Standard	225	(71%)	233	(67%)
International Reporting Standard	24	(8%)	25	(7%)
Alternative Reporting Standard (ARS)	65	(21%)	90	(26%)
Public Information Available	28	(9%)	56	(16%)
Audited Financials	231	(73%)	245	(70%)
Shell Company	30	(10%)	34	(10%)

[252] See supra note 25 for information about Commission-ordered trading suspensions. OTC Markets Group explains that a "caveat emptor" designation may be assigned to a security if OTC Markets Group becomes aware of a misleading or a manipulative promotion; a company is under investigation for fraudulent activity; there is a regulatory suspension on the security; the company fails to disclose a corporate action, such as a reverse merger; or there is another public interest concern associated with the security. See Caveat Emptor Policy, OTC Mkts. Grp. Inc. (last visited July 15, 2019), https://www.otcmarkets.com/learn/caveat-emptor.

[253] All statistics in Table 4 were estimated by analyzing security and issuer characteristics on the trading day before the start of a Commission-ordered trading suspension or an assignment of a "caveat emptor" designation by OTC Markets Group.

Overall, 318 quoted OTC securities were the subject of Commission-ordered trading suspensions over the calendar year 2018. Relative to the characteristics of the overall quoted OTC security market, broker-dealers were more likely to be able to rely on the piggyback exception to publish or submit quotations for quoted OTC securities subject to trading suspensions. Although issuers of suspended quoted OTC securities tended to be mostly reporting companies, they were less likely to have current public information available relative to the full sample of quoted OTC securities because many failed to file required reports.[254] Several of these companies were identified as shell companies (10 percent).

In addition, the Commission examined 357 instances in which quoted OTC securities were flagged with the "caveat emptor" designation by OTC Markets Group to inform investors to exercise additional care when considering whether to transact in these securities. Most of these companies had Commission-ordered trading suspensions.[255] Similar to the sample of OTC issuers with suspended securities, issuers of these securities were less likely to have publicly available information.

Increasing the availability of information about OTC issuers has the potential to counteract misinformation, which can proliferate through promotions and other channels. Several recent studies have examined the effects of stock promotions on investor trading in the

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[254] Issuers typically become subject to Commission-ordered trading suspensions under circumstances where there is a lack of publicly available current, accurate, or adequate information about the company. This may happen, for example, when a company is not current in its filings of periodic reports. As a result, it is not surprising that many of these issuers were not quoted in OTCBB or OTC market tiers that require current and publicly available financial information.

[255] For 297 of the 357 "caveat emptor" securities, this designation was assigned at the start of the suspension. In the remaining 21 suspensions over the calendar year 2018, the security had already been designated with a "caveat emptor" status prior to 2018. The remaining 60 instances of "caveat emptor" assignment were associated with fraud or public interest concerns other than trading suspensions.

OTC market.[256] For example, one study has found large price and trading volume movements following spam email campaigns that conveyed optimism about a particular OTC security's price and were viewed as containing credible information about the security.[257] Others have documented that cases in which issuers have secretly hired stock promoters for campaigns to increase their stock price and liquidity often are accompanied by trading by company insiders.[258] Based on publicly available website information reviewed by the Commission on OTC securities that were subjects of promotion campaigns, the Commission identified 350 OTC securities (three percent of all quoted OTC securities) that were featured in at least one promotion campaign during 2018. The vast majority of these OTC securities, 297 (85 percent), were issued by companies that did not otherwise provide current and publicly available financial disclosures. An alternative data source from OTC Markets Group data identified 241 OTC securities (two percent of all quoted OTC securities) that were involved in at least one promotion campaign during 2018 with 58 of these securities (24 percent) issued by companies that did not have publicly available information.

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256 See White, supra note 41, at 11–12.

257 See Karen K. Nelson et al. Are Individual Investors Influenced by the Optimism and Credibility of Stock Spam Recommendations?, 40 J. Business Fin. & Acct. 1155–83 (2013) ("[T]rading volume more than doubles in the days immediately following the spam campaign, and the mean return is positive and significant. However, the median return is zero, with nearly as many firms experiencing negative returns as positive on the spam date . . . . [C]ombining optimistic target price projections with credible, but stale, information from old press releases increase the return and volume reaction to spam. Moreover, the larger the return implied by the target price, the larger the market reaction.").

258 See Nadia Massoud et al., Does It Help Firms to Secretly Pay for Stock Promoters?, J. Fin. Stability 26, 45–61 (2016) (sampling both OTC securities and exchange-listed securities).

An academic study has found that OTC stocks tend to be owned primarily by retail investors rather than institutional investors.[259] Studies have also found that, on average, quoted OTC securities earn lower returns than exchange-listed stocks. These investment decisions by individuals may be due to investors misestimating payoff probabilities for OTC stocks by overweighting extreme positive outcomes, particularly in cases where there is a lack of available information about the issuer.[260] An alternative explanation, supported by recent research, indicates that some investors in OTC securities may be driven by a speculative motive.[261] Demographic analysis of OTC investors suggests that they tend toward higher wealth and education.[262] However, OTC security holding period returns are worse for investors residing in locations with populations that may be more vulnerable in that they are older, lower-income, and less educated.[263] Overall, findings in these studies suggest that investors in the OTC market might benefit from additional information regarding company fundamentals. For example, some retail investors could more readily find, through online searches, information that refutes

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259 See Ang et al., supra note 233 (stating that retail investors are "the primary owners of most OTC stocks, whereas institutional investors hold significant stakes in nearly all stocks on listed exchanges, including small stocks").

260 See White, supra note 41.

261 See Christian Leuz et al., Who Falls Prey to the Wolf of Wall Street? Investor Participation in Market Manipulation (NBER, Working Paper No. 24083, 2017), available at https://www.nber.org/papers/w24083.pdf. (finding an average loss of 30 percent in a sample of 421 pump-and-dump schemes from 2002 to 2015 involving 6,569 German investors). The study also finds that "35% of the tout investors have been day-trading in penny stocks or are frequent traders with short investment horizons. These investors appear to be willing to take substantial risks and trade aggressively also in other stocks. These investor types are more likely to invest in touts, place larger bets and have better returns. Their participation in touts looks quite differently from more conservative traders, who trade infrequently and do not invest in penny stocks. This group could be the ones that were tricked into the schemes." Id.

262 See White, supra note 41; see also John R. Nofsinger & Abhishek Varma, Pound Wise and Penny Foolish? OTC Stock Investor Behavior, 6 Rev. Behav. Fin. 2–25 (2014).

263 See White, supra note 41 ("[M]edian holding period returns deteriorate for zip codes with greater percentages of elderly, less education and residence stability, and lower income and wealth. All of the return differences are economically and statistically significant.").

misinformation disseminated through promotions with publicly available proposed paragraph (b) information. Other retail investors could benefit from more efficient prices that are less susceptible to manipulation as a result of the trading activity of better-informed investors who acquire this information.

C. Discussion of Economic Effects

1. Effects of Rule 15c2-11 Amendments

In this section, the Commission discusses the expected costs and benefits of the proposed amendments to Rule 15c2-11. These amendments generally seek to increase the availability of current company financial information within the quoted OTC market and modify rule requirements to account for developments in this market.

The amendments would impact OTC investors, issuers, and intermediaries such as broker-dealers. The Commission anticipates the principal economic effects of the proposed amendments to be as follows. First, the transparency requirements could enable investors to learn more about the fundamental value of certain companies in the OTC market, which may direct their funds toward higher-return investments. In addition, other investors could benefit from more efficient prices that are less susceptible to manipulation as a result of the trading activity of better-informed investors who acquire this information. Second, the amendments may reduce the incidence of fraudulent schemes, such as pump-and-dump activity, as a result of heightened disclosure requirements and restrictions on the piggyback exception being applied to non-transparent and illiquid securities. Finally, broker-dealers could bear additional costs from the information review requirement as well as filing FINRA Forms 211 more frequently (e.g., if proposed paragraph (b) information is not publicly available) as a result of, among other things,

proposed limitations on relying on the piggyback exception.[264] To the extent that broker-dealers currently incur costs associated with disseminating proposed paragraph (b)(5) information, such costs on broker-dealers may be mitigated to some extent. The requirement for proposed paragraph (b)(5) information to be publicly available would reduce the broker-dealer's obligation to make proposed paragraph (b) information available upon request to interested investors electronically.

In specific circumstances, other provisions of the proposed amendments seek to relieve broker-dealers of costs related to the information review requirement and filing FINRA Form 211. For example, the exception for issuers with ADTV value greater than $100,000, total assets greater than $50 million, and unaffiliated shareholder equity greater than $10 million will relieve broker-dealers of the information review requirement for larger, more liquid issuers which are potentially less susceptible to fraud.

Broker-dealers could also incur costs and benefits associated with possible migration in trading activity from certain issuers and markets to others (e.g., between quoted and grey markets). Some of these costs and benefits to broker-dealers may be passed on to investors in the form of higher or lower transaction costs and account fees. The costs and benefits associated with the specific proposed Rule provisions are discussed below.

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[264] Several of the proposed amendments would provide additional exceptions to the Rule (e.g., eliminating the requirement for 12 business days of quotes within the previous 30 calendar days to establish piggyback eligibility). However, the Commission does not expect these amendments to have a significant impact on the costs and benefits of the Rule, as discussed below.

a) Making Proposed Paragraph (b) Information Current and Publicly Available

The costs and benefits discussed below pertain to the general requirements for proposed paragraph (b) information to be publicly available and current to publish or submit quotations for, or to maintain a quoted market in, quoted OTC securities. They also pertain to the new public disclosure requirements for the unsolicited quotation exception. The Commission expects that investors would benefit from easier access to proposed paragraph (b) information through public mediums, such as EDGAR or the website of a qualified IDQS, a registered national securities association, the issuer, or a registered broker-dealer that publishes proposed paragraph (b) information related to quoted OTC securities.

Presently, not all issuers of quoted OTC securities publicly disclose current financial information.[265] This information could allow investors to better assess the quality of the issuer and help them to avoid lower-return investments, such as those involved in a fraudulent scheme. By enabling investors to compare information contained in promotion campaigns to that in current company disclosures, the proposed requirement for proposed paragraph (b) information to be publicly available may help investors avoid trading on false information. Investors could also use this information to make better-informed corporate voting decisions to the extent that OTC issuers put matters to a shareholder vote in annual or special meetings.[266] Investors could also benefit from more efficient prices that are less susceptible to manipulation as a result of the

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[265] Notably, there are no requirements to make financial disclosures publicly available for OTC securities quoted on the OTC Market OTC Pink: No Information tier. An analysis of quoted OTC securities during the calendar year 2018 has revealed that approximately 32 percent of issuers do not publicly disclose current financial information. See supra Part VIII.B.

[266] The Commission lacks data on the quantity and nature of matters put to a vote at annual or special meetings of issuers of quoted OTC securities not subject to Commission reporting obligations.

trading activity of better-informed investors who acquire this information. In addition, broker-dealers will be restricted from publishing quotations for securities without publicly available proposed paragraph (b) information, which would likely push trading activity in these securities into the grey market.[267] Therefore, these proposed requirements could have a deterrent effect in inhibiting fraudulent activity related to quoted OTC securities. Investors could benefit from decreased exposure to investment losses as a result of diminished frequency of fraudulent activity in the OTC market.

Higher quality issuers (i.e., issuers more likely to have productive investment opportunities) could benefit from increased access to capital to the extent that the change leads to a net increase in demand for higher quality OTC stocks. Previous academic studies have highlighted the relationship between the breadth and quality of firm disclosures and liquidity in the OTC market.[268] Conversely, issuers may also incur costs associated with making proposed paragraph (b) information publicly available to enable broker-dealers to publish or submit quotations for their securities. These costs could include preparing and producing proposed

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[267] Using data on daily dollar trading volume for quoted OTC securities during the 2018 calendar year, the Commission finds that quoting activity and trading activity are correlated. In particular, the Commission finds that OTC securities with published quotations were 1.82 times more likely to have reported a positive dollar trading volume on a given day in 2018 relative to securities trading on the grey market. In addition, if they were traded, OTC securities with published quotations had, on average, 6.68 times greater daily dollar trading volume than securities trading on the grey market. See supra note 234 for a description of OTC securities data sources.

[268] See John (Xuefeng) Jiang et al., Private Intermediary Innovation and Market Liquidity: Evidence from the Pink Sheets Market, 33 Contemp. Acct. Res. 920–948 (2016) (finding that following the introduction of Pink tiers in OTC Markets Group, each associated with different self-established eligibility requirements pertaining to disclosure, firms with higher levels of disclosure experienced an increase in liquidity, while firms that did not disclose information experienced a decrease in liquidity); see also Bruggemann et al., supra note 49 (finding that market liquidity and the propensity of a security to experience a crash in returns, both used as proxies for the quality of a security in the analysis, decrease monotonically when moving across OTC tiers from those with high regulatory strictness and disclosure requirements to those with lower requirements); Ryan Davis et al., Information and Liquidity in the Modern Marketplace (Working Paper, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2873853.

paragraph (b) information in document form and ensuring that the proposed paragraph (b) information is publicly available.[269] However, this particular cost is mitigated by the fact that these amendments would offer several possible alternatives for releasing proposed paragraph (b) materials, including making disclosures on public information repositories, such as EDGAR.[270] Alternatively, OTC issuers may elect not to provide proposed paragraph (b) information to the public, in which case their securities may exit from the quoted market, and their shareholders may incur costs related to loss of liquidity. The Commission estimates that the cost to an issuer in connection with this proposed amendment to the Rule will be, at most, equivalent to the cost of completing and filing a Form C-AR under Regulation Crowdfunding. The staff report on Regulation Crowdfunding cites survey data and estimates related costs to issuers to be, at most $12,804.[271] There were 3,211 issuers of quoted OTC securities in 2018 without public information subject to the requirements of proposed paragraph (b)(5).[272] Therefore, the Commission estimates that the maximum annual monetized cost of producing and updating proposed paragraph (b) information and making it publicly available every six months to be

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269 Issuers that presently make disclosures publicly available, either voluntarily or because of a reporting obligation, and have systems in place for the preparation of these disclosures, would not face additional costs as a result of this proposed amendment. An analysis of quoted OTC securities during the calendar year 2018 has revealed that approximately 68 percent of issuers publicly disclose current financial information. See supra Part VIII.B.

270 Presumably, issuers will choose the most cost-effective method to disseminate proposed paragraph (b) information.

271 See U.S. Securities and Exchange Commission Staff, Report to the Commission: Regulation Crowdfunding (June 18, 2019), available at https://www.sec.gov/files/regulation-crowdfunding-2019_0.pdf. This report cites survey data and estimates costs to issuers undertaking a crowdfunding offering, including accounting costs of $3289, legal costs of $3297, and certain disclosure costs of $6218. Some of these costs may include costs unrelated to Form C-AR (such as legal review of promotional materials). Therefore, the cost cited above serves as an upper bound for the cost of completing and filing Form C-AR.

272 See supra Part VIII.B for an analysis of quoted OTC securities issuers for which there was no public information in 2018. Proposed paragraph (b)(5) would include issuers without a reporting obligation in addition to issuers delinquent in their reporting obligations.

$82,227,288 across OTC issuers (and this represents a high upper bound, because the survey includes costs that may be unrelated to the proposed Rule, such as legal review of promotional materials).[273] This cost may be mitigated by a number of factors, including whether some of the cost associated with ensuring that the proposed paragraph (b) information is publicly available may be borne by broker-dealers intending to quote the security of this issuer.[274]

Broker-dealers may incur costs or accrue benefits from changes in the liquidity of quoted OTC securities as a result of changes in demand associated with new disclosures within quoted markets. For example, there may be changes in trading volume which alter the number of transactions from which broker-dealers earn fees. As discussed below, there may be migration from the quoted market to the grey market for OTC issuers avoiding these requirements. Therefore, the proportion of rents earned by broker-dealers from the grey market for OTC securities may increase relative to the quoted market. The net effect of these changes on the profits of trading intermediaries is unclear. Some of these costs and benefits to broker-dealers may be passed on to investors in the form of higher or lower transaction costs and account fees. The Commission anticipates that costs and benefits would be passed on more readily as competition increases among broker-dealers for OTC transactions.

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[273] $12,804 x 3,211 issuers x two times per year = $82,227,288. In the Commission's estimate of the maximum total cost to issuers of providing proposed paragraph (b) information publicly, the Commission has assumed that all issuers of quoted OTC securities that do not currently provide information publicly will choose to do so consistent with the proposed rule provisions. In addition, the Commission has assumed that these issuers will update this information every six months in order to maintain quoting activity in their securities. It may be the case that some of these issuers will choose not to provide any disclosures and quoting in their securities will cease. In these cases, costs associated with providing proposed paragraph (b) information for these issuers will be null.

[274] For example, it is unclear the extent to which specific OTC issuers without public disclosures may already be producing financial information internally or even have operations producing income and other accounting items. In these cases, the Commission expects the cost for these issuers would be less than the Commission's estimate.

b) Proposed Amendments to Rule 15c2-11 Exceptions

The following proposed amendments to the piggyback exception would serve to limit the circumstances under which the exception would apply relative to the baseline: the requirement for proposed paragraph (b)(5) information to be current and publicly available within six months before the date of publication or submission of quotation in an IDQS in order for broker-dealers to continue to rely on the piggyback exception; the requirement that reliance on the piggyback exception be based upon quotations with both bid and ask prices; and the inability of broker-dealers to rely on the piggyback exception to publish or submit quotations for securities of shell companies or for securities within 60 calendar days of a trading suspension. These amendments generally would serve to draw quotation and trading activity away from less liquid and less transparent quoted OTC securities.

Currently, broker-dealers may rely on the piggyback exception to publish or submit quotations for the vast majority of quoted OTC securities, but many issuers of these securities do not provide current publicly available financial disclosures.[275] This requirement would encourage OTC issuers that would like to maintain a quoted market for their securities to provide current information to the public. The Commission discusses in detail the expected benefits and costs associated with providing current information publicly for investors, issuers of quoted OTC securities, and broker-dealers above.

Generally, these amendments could benefit investors by drawing their trading activity away from less liquid and less transparent quoted OTC securities that could attract fraudulent

[275] See supra note 265. The Commission estimates that during the calendar year 2018, issuers of 3,250 quoted OTC securities for which broker-dealers were relying on the piggyback exception when publishing quotations, did not have publicly available current information.

activity. Issuers in the OTC market could benefit from greater access to capital.[276] These amendments could also benefit investors by potentially deterring fraudulent activity. For example, the inability of broker-dealers to rely on the piggyback exception when publishing quotations for securities of shell companies could draw trading activity away from these securities. Currently, many publications of quotations for quoted OTC securities associated with issuers identified as shell companies are eligible for broker-dealers to rely on the piggyback exception. Potential fraudsters would incur costs in providing proposed paragraph (b) information to perpetrate fraud in shell companies.

These amendments could also cause broker-dealers to incur additional costs. In particular, broker-dealers may need to comply with the information review requirement as well as file FINRA Forms 211 more often to maintain a quoted market for securities under these restrictions. The Commission estimates that it will take broker-dealers four hours to complete the information review and file Form 211 for prospectus issuers, Reg. A issuers, and reporting issuers and eight hours to do so for exempt foreign private issuers or catch-all issuers whenever a broker-dealer initiates the publication or submission of a quotation for an OTC security.[277] Therefore, broker-dealers will bear a monetized cost of $240 for prospectus issuers, Reg. A issuers, and reporting issuers, $480 for exempt foreign private issuers and catch-all issuers whenever a broker-dealer initiates the publication or submission of a quotation in an OTC

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[276] The potential increase in access to capital for issuers is based on the likelihood that OTC market investors prefer to invest in unlisted securities, and market changes as a result of the proposed amendments could result in the divestiture of fraud-related securities and increased investment in non-fraud-related securities. However, to the extent that investment decisions are driven by other factors, such as a personal interest in specific companies, then there might be no increase in access to capital for issuers.

[277] The Commission estimates that it would take one hour for a broker-dealer to complete and file FINRA Form 211.

security.[278] The Commission estimates that 3,696 securities would lose piggyback eligibility as a result of the proposed restrictions on the piggyback exception.[279] Therefore, the aggregate monetized cost on broker-dealers would be $1,426,800 assuming that 1,447 securities were from prospectus, Reg. A, or reporting issuers, 238 were from exempt foreign private issuers, and 2,011 were from catch-all issuers.[280]

Broker-dealers may also incur costs related to determining whether or not these conditions apply to the issuer (i.e., whether the issuer is a shell company within the proposed definition). The Commission believes that broker-dealers could set up information systems to assess whether these conditions apply to OTC securities such that there would a one-time cost but negligible ongoing cost. However, these costs on individual broker-dealers may be mitigated by allowing a qualified IDQS to satisfy the information review requirement under the Rule, as the amendments propose. Additionally, these costs may be mitigated by permitting broker-

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[278] 94 hours x $60 per hour = $240 for prospectus, Reg. A, and reporting issuers; 8 hours x $60 per hour = $480 for exempt foreign private issuers and for catch-all issuers.

[279] The Commission estimates that during 2018, broker-dealers could publish quotations relying on the piggyback exception for 10,122 quoted OTC securities. The Commission estimates the total number of securities that would lose piggyback eligibility under the proposed amendments by considering the number of securities that were piggyback eligible, but also would meet at least one of the following conditions: (1) the issuer of the quoted OTC security did not provide public information (3,022 securities); (2) the issuer of the quoted OTC security was a shell company (448 securities); (3) the security did not have both bid and ask quotations for four or more consecutive days (879 securities); and (4) the security was piggyback eligible after having been suspended (316 securities).

Of the 3,696 securities that would lose piggyback eligibility under the proposed amendments, 1,447 were securities of prospectus issuers, Reg. A issuers, and reporting issuers, 238 were of exempt foreign private issuers, and 2,011 were of catch-all issuers.

[280] 1,447 x $240 + 238 x $480 + 2,011 x $480 = $1,426,800. To the extent that broker-dealers may maintain the ability to rely on the piggyback exception by starting to publish both bid and ask quotations for securities that are presently piggyback eligible with only bid, ask or unpriced quotations, fewer securities may lose piggyback eligibility under the proposed amendments than the estimates the Commission presents. As noted in the PRA section, broker-dealers may also withdraw from quoting in securities such as shell companies and suspended securities. Therefore, the Commission expects the costs for broker-dealers computed here to be an upper bound.

dealers to rely on determinations by qualified IDQSs and national securities associations that proposed paragraph (b) information is publicly available and that an exception to the Rule applies. The Commission estimates that it would take a broker-dealer, IDQS, or national securities association fifteen hours to establish a system to determine whether exceptions apply to an issuer, for a maximum aggregate cost of $81,900.[281] Alternatively, broker-dealers could withdraw from publishing or submitting quotations for certain OTC securities as a result of the requirements related to proposed paragraph (b) information, including the requirements to review and retain this information. This withdrawal may impose costs on investors by reducing liquidity for OTC securities they might want to purchase or already own prior to the withdrawal of liquidity. In addition, such withdrawal might impose costs of raising capital for OTC issuers. Broker-dealers could, again, incur costs and benefits associated with possible migration in trading activity from certain issuers to others as well as from the quoted to non-quoted market. Some of these costs and benefits to broker-dealers may, again, be passed on to investors.

The proposed requirement that reliance on the piggyback exception be conditioned on quotations with both bid and ask prices could also impose costs on broker-dealers and issuers of quoted OTC securities by possibly limiting the formation of an active quoted market for OTC securities for which broker-dealers initially publish quotes with only either a bid or ask price or no prices at all. The Commission estimates that, out of 431 quoted OTC securities for which broker-dealers could start relying on the piggyback exception to publish or submit quotations during the calendar year 2018, 45 (10 percent) OTC securities had quotes with only either a bid

[281] (89 broker-dealers + 1 IDQS + 1 National Securities Association) x 15 hours x $60 = $81,900. These costs are an upper bound of the total costs on broker-dealers because the actual number of broker-dealers quoting OTC securities may be a subset of the 89 broker-dealers identified by OTC Markets Group.

or ask price for the entire first 30-days of being quoted and 14 (three percent) had unpriced quotes only.[282] At the same time, however, if the proposed requirement were to encourage broker-dealers to shift away from publishing unpriced or quotations with only either a bid or an ask price to publishing quotations with both bid and ask prices for some quoted OTC securities, the proposed requirement may expedite the development of a two-sided market and facilitate price discovery and liquidity in these securities.

In contrast, eliminating from the piggyback exception the requirement for 12 days of quotations within the previous 30 calendar days has the potential to widen the circumstances under which broker-dealers may rely on the piggyback exception relative to the baseline. This proposed amendment could make publishing quotations and trading easier in less liquid securities. Therefore, this amendment could, in principle, mitigate both the benefits and costs of the amendments described above. However, the Commission expects that eliminating the 12-day publication-of-quotations requirement would have an insignificant effect on the OTC market as it should only impact a small fraction of quoting activity. In particular, of all quoted OTC securities in the calendar year 2018, the Commission estimates that only nine of more than 10,000 securities had fewer than 12 days of published quotations within the 30 previous calendar days, with no more than four business days in succession without a quotation.

These proposed amendments also include changes to the exception for unsolicited customer quotations. In particular, the amendments limit reliance on the unsolicited quotation exception on behalf of company insiders when proposed paragraph (b) information is not current and publicly available. These amendments could increase costs for broker-dealers because they

[282] Of the 14 quoted OTC securities that became piggyback eligible based on unpriced quotations, six (42 percent) had a published priced quote within the first 60 days after becoming piggyback eligible.

may need to verify whether proposed paragraph (b) information is current and publicly available. Broker-dealers could also be required to document and record the circumstances involved in an unsolicited customer quotation. The Commission estimates that the cost of establishing systems to document and record these circumstances would be included in the $81,900 systems cost discussed previously. In addition, the Commission estimates that it would take a broker-dealer one minute to document and record these circumstances for each customer order arising from a distinct customer and circumstance, resulting in a monetary cost of $89.[283] The Commission lacks data to estimate how many unsolicited customer quotations come from distinct customers under distinct circumstances, which would trigger the need for broker-dealers to document a new circumstance. They could also increase costs for broker-dealers as a result of the information review requirement, as well as filing FINRA Form 211, when the exception does not apply. The costs to broker-dealers associated with these requirements for various types of issuers are the same as discussed previously in this section. However, the Commission lacks data on which unsolicited customer quotations come from company insiders.

These costs could be passed on to OTC investors. For example, OTC investors may be required to provide documentation supporting the fact that they are not a prohibited person within this exception, and may experience reduced liquidity in certain securities in which they are invested. The magnitude of this potential cost to OTC investors could vary significantly depending on the manner in which it is or is not acquired by broker-dealers. However, the Commission believes that this cost could be minimal because there are means to provide

[283] (89 broker-dealers x 1 hour) x $60 = $5340. (89 broker-dealers x 1/60 hour) x $60 = $89.

documentation such as through attestations which would require minimal resources on the part of the investor.

There could also be benefits to OTC investors from the requirement for broker-dealers to obtain and review proposed paragraph (b) information when the unsolicited quotation exception does not apply. For example, the review of proposed paragraph (b) information in order to provide a quotation for an unsolicited customer quotation of a company insider could deter fraud by alerting broker-dealers to potential sales by company insiders related to fraud. In addition, as discussed above in relation to proposed limitations on the piggyback exception, the costs and benefits to investors, issuers and broker-dealers would be qualitatively similar. Issuers in the OTC market could benefit from greater access to capital if capital flows away from fraudulent investments. Broker-dealers could also incur costs and benefits associated with possible migration in trading activity if unsolicited customer orders move from quoted to non-quoted markets. These costs and benefits could be passed on to OTC investors. Finally, there would be benefits and costs associated with the requirements pertaining to public disclosure of proposed paragraph (b) information, as the unsolicited quotation exception for a company insider would be contingent on this information being current and publicly available.

c) Proposed New Exceptions to Rule 15c2-11 to Reduce Burdens

These amendments propose three new exceptions to except publications of quotations for certain OTC securities from the provisions of Rule 15c2-11, primarily the requirement for broker-dealers to obtain and review proposed paragraph (b) information. The first of the three new exceptions would apply to securities with (1) a $100,000 ADTV value and where (2) the issuer of such security has $50 million total assets value and $10 million unaffiliated shareholders' equity on the issuer's publicly available audited balance sheet issued within six

months after the end of the most recent fiscal year. This exception would apply only to securities for which proposed paragraph (b) information is current and publicly available. This exception is meant to target more visible quoted OTC securities for which current and reliable information about the issuer is publicly available to investors, specifically for larger issuers, and for more liquid securities. This exception is expected to reduce the broker-dealer burden of complying with the Rule with respect to publishing quotations for securities for a subset of issuers of OTC securities. The analysis in the baseline revealed no issuers that had financial information publicly available to investors and that had been the subject of Commission-ordered trading suspensions or assigned a "caveat emptor" designation by OTC Markets Group in calendar year 2018 would have met both the ADTV and assets tests.[284] Therefore, the Commission expects that many other quoted OTC securities that would qualify for these exceptions would be less susceptible to misinformation campaigns and share price run-ups as a result of buying pressure.

The main economic effect of this proposed exception regarding ADTV and assets tests should be to relieve broker-dealers from the information review requirement and filing a FINRA Form 211 to publish quotations in a quotation medium. As before, the Commission estimates that broker-dealers will incur relief from a monetized cost of $240 for prospectus issuers, Reg. A

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[284] The Commission finds that in 2018, five suspended securities and 17 "caveat emptor" securities had an ADTV value in excess of $100,000. However, issuers of these securities would not have satisfied the thresholds for assets and unaffiliated shareholder equity required to qualify for the exemption under the proposed amendments. Similarly, 11 issuers of suspended securities and 10 issuers of securities with the "caveat emptor" designation that met the assets and the shareholder thresholds did not have sufficient trading volume that would meet the liquidity threshold.

This analysis pertains to total shareholder equity which serves as an upper bound for unaffiliated shareholder equity. Therefore, any firms which fall below $10 million in shareholder equity fall below this threshold for unaffiliated shareholder equity.

Because delinquent filings may be the reason for the trading suspension, the Commission is aware that the Commission's analysis using data on total assets and shareholder equity of issuers with suspended OTC securities may rely on information which is outdated and no longer representative of issuer fundamentals.

issuers, and reporting issuers, $480 for exempt foreign private and catch-all issuers whenever a broker-dealer publishes or submits a quotation for issuers satisfying these requirements. According to the Commission's estimates from the PRA, two issuers would be reporting issuers while one would be a catch-all issuer per year so that the total cost savings would be $960.[285] Broker-dealers would also need to incur costs to verify that OTC issuers satisfy these ADTV and size thresholds. The Commission believes that broker-dealers could set up information systems to assess whether these conditions apply to OTC issuers such that there would a one-time cost but negligible ongoing cost. This cost would be included in the $81,900 systems cost across broker-dealers, IDQSs, and national securities associations discussed previously. Some of these benefits and costs may be passed on to OTC investors. Certain issuers or securities that would meet the Rule's proposed ADTV and assets test but currently trade in the grey market may benefit from a broker-dealer establishing a quoted market without incurring costs associated with complying with the Rule's provisions. This migration may result in a benefit to investors to the extent that it may establish a new quoted market that facilitates price discovery and liquidity for higher quality securities previously trading in the grey market.

The second of the three proposed new exceptions would apply to quotations following a registered or Regulation A offering, where the broker-dealer was named as an underwriter in the registration statement or offering circular and publishes or submits quotations for the same class

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[285] (2 reporting issuers x $240) + (1 catch-all issuer x $480) = $960.

There could be additional relief as a result of the ADTV and assets exceptions for broker-dealers quoting securities that end up losing piggyback eligibility under the proposed paragraph (g)(3) exception. The Commission estimates that out of the 3,696 securities that would lose piggyback eligibility under the proposed amendments, four securities of prospectus issuers, Reg. A issuers, and reporting issuers and three securities of exempt foreign private issuers would have satisfied the ADTV value and assets thresholds. The ability of broker-dealers to rely on the proposed paragraph (g)(5) exception for securities for which they could no longer rely on the proposed paragraph (g)(3) exception could lead to an additional relief of four x $240 + 3 x $480 = $2,400.

of security in an IDQS within certain specified time frames. This exception is targeted towards those OTC securities that were recently offered in a transaction in which a regulated entity may have conducted a due diligence review. Because of the liability attached to underwriting activity, an underwriter typically conducts a due diligence review to mitigate potential liability associated with underwriting an offering of securities. Depending on its breadth and quality, this review may permit an underwriter to assert a defense to liability under Section 11 or Section 12(a)(2) of the Securities Act. As a result, underwriters of registered and Regulation A offerings are incentivized to confirm that the information provided to investors in the prospectus for a registered offering and offering circular for a Regulation A offering is materially accurate and obtained from a reliable source. Thus, excepting these quotations from the Rule's provisions is expected to reduce the burden of complying with the Rule for certain broker-dealers without sacrificing investor protection. The Commission does not currently have data that allow it to estimate the propensity with which broker-dealers are underwriting offerings for the same securities for which they are publishing quotations and thus quantify the effect of this exception on broker-dealers.

In addition, the Commission is also proposing an exception for publications or submissions of quotations respecting securities where a qualified IDQS complies with the Rule's provisions, so long as the issuer of the security is not a shell company. Broker-dealers could also rely on a publicly available determination by a qualified IDQS that proposed paragraph (b) information is current and publicly available for a given security. This exception is expected to reduce the burden on some broker-dealers with respect to publishing or submitting quotations for certain OTC securities. However, broker-dealers may incur additional costs related to determining certain characteristics about the issuer (e.g., whether the issuer is a shell company

within the proposed definition). The Commission believes that broker-dealers or qualified IDQSs could set up information systems to assess whether these conditions apply to OTC issuers such that there would a one-time cost but negligible ongoing cost. This cost would again be included in the $81,900 systems cost across broker-dealers, IDQSs, and registered national securities associations discussed previously. These costs and benefits may, again, be passed on to OTC investors. Although the Commission recognizes that, currently, an IDQS already operates as a public repository for some information about the securities that trade in their market, the Commission is unable to predict how common it would become for a qualified IDQS to be willing to take on the responsibility of satisfying the requirements of the qualified IDQS review exception to the Rule, allowing certain broker-dealers to qualify for this exception.

Lastly, the Commission is also proposing an exception for publications or submissions of quotations by broker-dealers that rely on publicly available determinations by a qualified IDQS or a registered national securities association that proposed paragraph (b) information is current and publicly available, as well as whether a broker-dealer may rely on certain proposed exceptions to the Rule. The Commission expects the main economic effect of this proposed exception to be mitigating costs broker-dealers are expected to incur associated with determining certain characteristics about an issuer (e.g., whether the issuer is a shell company within the proposed definition, or whether the security jointly satisfies the ADTV and assets tests.) However, the Commission is unable to predict how common it would become for a qualified IDQS or registered National Securities Association to make these determinations.

2. Efficiency, Competition, and Capital Formation

In this section, the Commission discusses the impact that the proposed amendments to Rule 15c2-11 may have on efficiency, competition, and capital formation. As discussed above,

these amendments generally would increase transparency by requiring public availability of proposed paragraph (b) information that is current to enable broker-dealers to publish or submit quotations for OTC securities. As a result, the proposed amendments may cause capital to migrate from opaque to more transparent companies. A transfer of capital could occur as a result of non-disclosing OTC issuers either exiting OTC market altogether or migrating from the quoted OTC market to the grey market. This transfer of capital would occur where OTC issuers opt not to make existing paragraph (b) information publicly available. Less liquid OTC securities could also migrate away from the quoted OTC market as a result of the proposed restrictions on the piggyback exception pertaining to (1) shell companies, (2) recently suspended securities, and (3) securities without a sufficient prior history of both bid and ask prices. One academic study finds that valuations decrease when firms migrate from more liquid markets to less liquid markets, possibly as a result of decreased access to capital.[286] Therefore, investors may reallocate capital away from OTC issuers of these less liquid securities as these issuers exit the quoted OTC market. These proposed amendments could decrease investors' exposure to fraudulent activity directed toward non-transparent or illiquid securities. Capital formation could improve as investors' funds are diverted away from fraudulent OTC securities, which would migrate away from the quoted OTC market, and investors move toward the investments that remain.

In addition, the transparency of the market for quoted OTC securities should generally improve, particularly for non-disclosing issuers that decide to start publicly disclosing proposed

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[286] See James J. Angel, et al., From Pink Slips to Pink Sheets: Liquidity and Shareholder Wealth Consequences of NASDAQ Delistings (Working Paper, Nov. 4, 2004), available at https://www.researchgate.net/profile/Jeffrey_Harris7/publication/4893245_From_Pink_Slips_to_Pink_Sheets_Liquidity_and_Shareholder_Wealth_Consequences_of_Nasdaq_Delistings/links/02e7e527daa56e7612000000.pdf.

paragraph (b) information to remain on the quoted OTC market. Capital formation could improve as investors allocate funds toward more productive investments based on enhanced availability of proposed paragraph (b) information in the quoted market for OTC securities. In particular, investors may be able to better discern the value of an OTC security from the financial and qualitative data contained in proposed paragraph (b) information. As a result of these effects, these proposed amendments could generally enhance the efficiency of capital allocation, i.e., the degree to which funds are diverted away from low value investments and toward high value investments. Previous academic studies have documented a relationship between greater quality of a firm's disclosures and a decreased cost of capital for the firm.[287] Other studies find a relationship between increased quality and frequency of accounting disclosures and the productivity of corporate investment.[288] As discussed previously, certain OTC issuers may withdraw from quoted markets as a result of the proposed disclosure requirements and lose access to capital as a result. However, these issuers may be less likely to have productive investment opportunities than those that opt to disclose, which may mitigate the impact on capital formation.

The efficiency of prices (i.e., the degree to which prices reflect the fundamental value of the security) could also improve in the OTC market as a result of greater transparency. In particular, prices could become less susceptible to manipulation as a result of the trading activity of informed investors who would have access to proposed paragraph (b) information. These

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[287] See supra note 269; Luzi Hail & Christian Leuz, International differences in the cost of equity capital: Do legal institutions and securities regulation matter?, 44 J. Acct. Res. 485–531 (2006) (finding that stock markets with greater disclosure requirements have lower costs of capital in cross-country comparisons).

[288] See e.g., Sugata Roychowdhury et al., The Effects of Financial Reporting and Disclosure on Corporate Investment: A Review, J. Acct. & Econ. (forthcoming 2019).

investors could buy underpriced securities and sell overpriced securities, pushing mispriced securities toward fundamental values.

The heightened transparency that would arise from the proposed amendments could increase competition among both broker-dealers and issuers of quoted OTC securities. For example, broker-dealers could access proposed paragraph (b) information at a low cost and establish more competitive prices. Prior to these proposed amendments, broker-dealers could have had differential access to proposed paragraph (b) information in quoted the OTC market and potentially benefited from non-competitive pricing as a result. As mentioned previously, some broker-dealers may withdraw from quoting certain OTC securities (e.g., shell companies) as a result of the costs of initiating and resuming quotations associated with the proposed amendments. As a result, there may be diminished price competition in these types of securities.

Issuers of quoted OTC securities may also need to price seasoned equity offerings more competitively because investors would have improved access to information and might be able to more easily compare the financials of OTC issuers when allocating their investment dollars. This information could again enable OTC investors to divert funds more easily from higher to lower cost issues. As a result, OTC issuers would have less ability to price their issues high relative to the fundamental value of the securities being offered.

D. Reasonable Alternatives

In this section, reasonable alternatives to the proposed amendments to Rule 15c2-11 are discussed.

1. Eliminating the Piggyback Exception

The 1999 Reproposing Release proposed to eliminate the piggyback exception from Rule 15c2-11. This amendment would have required all broker-dealers to complete the information

review requirement and file FINRA Form 211 before publishing or submitting a quotation in a quotation medium. Relative to the baseline (i.e., the existing provisions of Rule 15c2-11), this alternative would have increased the costs of broker-dealers that complied with the Rule's review, document collection, and recordkeeping provisions prior to publishing or submitting a quotation for an OTC security. These costs could be passed on to OTC investors. Alternatively, some broker-dealers could withdraw from publishing quotations in the OTC market as a result of the information review requirement, which could lead to the disappearance of a quoted market for some OTC securities and a migration of these securities to the grey market. Both possible effects would benefit investors by imposing costs on potential fraudsters in the OTC market.

First, review of proposed paragraph (b) information could help broker-dealers increase price efficiency, while deterring fraudsters. Second, broker-dealers' withdrawal from publishing quotations for OTC securities could benefit investors by inhibiting fraudulent and manipulative schemes. However, broker-dealers might also withdraw from publishing quotations for securities of high quality issuers at the same time. Eliminating the piggyback exception would be expected to increase capital raising costs for OTC issuers. Therefore, the net effect of this alternative on OTC investors and issuers is unclear.

The Commission preliminarily believes that the proposed Rule more appropriately meets the Commission's policy goals because the alternative places the additional burdens upon broker-dealers and OTC issuers relative to the proposed amendments, while it fails to target OTC securities most vulnerable to fraud and manipulation. In particular, broker-dealers would incur additional costs associated with review of proposed paragraph (b) information and filing FINRA Form 211 for all OTC securities they wish to quote. In addition, this alternative could raise the

cost of capital for OTC issuers relative to the proposed amendments again without targeting those issuers most vulnerable to fraud and manipulation.

2. Eliminating the Piggyback Exception for Shell Companies after Reverse Mergers

These amendments to Rule 15c2-11 propose to eliminate the piggyback exception for publications or submissions of quotations for shell companies, which could inhibit pump-and-dump schemes that can be targeted toward shell companies. One possible alternative would be to more narrowly target pump-and-dump schemes by eliminating the piggyback exception for publications or submissions of shell companies only during a fixed period after a reverse merger between a shell company and an operating company. Because there is often no public information about the post-merger company, eliminating the piggyback exception at that point would require the issuer to make proposed paragraph (b) information publicly available for a broker-dealer to maintain an actively quoted market. The economic effect of this alternative would be directionally similar to that of the proposed restriction on publications or submissions of quotations for securities of all shell companies.

In particular, this alternative could improve the welfare of investors by helping them avoid fraud perpetrated through shell companies following a reverse merger. Second, issuers in the OTC market could benefit from greater access to capital.[289] Although broker-dealers would bear costs from the information review requirement and filing FINRA Form 211 for securities of shell companies after a reverse merger (with some of this cost possibly passed on to OTC investors), this cost may be lower relative to the proposed amendments because, under this

[289] The potential increase in capital availability would occur to the extent that, in response to an exit from quoted markets by certain issuers, OTC market investors reinvest with other OTC market companies, reflecting a preference for unlisted investments.

alternative, broker-dealers would only need to bear this cost after a reverse merger. However, under this alternative, broker-dealers may incur additional costs in monitoring the OTC market for reverse mergers relative to the proposed amendments. The Commission preliminarily believes that the proposed Rule is more appropriate than the alternative because of the additional cost on broker-dealers. In addition, the Commission recognizes that broker-dealers may not be able to accurately identify reverse mergers when they occur.

3. Alternative Thresholds for Exceptions

The 1999 Reproposing Release proposed to except publications of quotations from the provision of Rule 15c2-11 for OTC securities with at least: (1) $100,000 ADTV value, (2) $50 million total assets value and $10 million shareholders' equity on the issuer's audited balance sheet or (3) $50 bid price. These exceptions were less restrictive than the ones in the current proposed amendments as the exception would apply if an OTC security could conform to only one of these three conditions. Therefore, one possible alternative would be to establish thresholds which conform to these conditions from the 1999 Reproposing Release.

Relative to the baseline, the main economic effect of this alternative would be to relieve broker-dealers from complying with the Rule's provisions and filing FINRA Form 211 to publish quotations in a quotation medium. Some of these benefits may be passed on to OTC investors. Certain issuers or securities that would qualify for these exceptions but currently trade in the grey market may benefit from a broker-dealer establishing a quoted market without incurring costs associated with complying with the Rule's provisions. This migration may result in a benefit to investors to the extent that it may establish a new quoted market that facilitates price discovery and liquidity for quality securities previously trading in the grey market.

Relative to the proposed amendments, however, this alternative is more likely to except securities that may be targeted for fraudulent activity from the Rule's review and document collection provisions. For example, there were five suspended OTC securities in 2018 with ADTV value in excess of $100,000 and 11 issuers of suspended OTC securities that exceeded the thresholds for $50 million in total assets and $10 million in shareholders' equity. Therefore, investors may incur costs from greater exposure to fraud and manipulation relative to the proposed amendments. As a result, the Commission preliminarily believes the proposed Rule is better than the alternative. However, investors in higher quality OTC issuers could benefit in that a greater number would qualify for the quoted market relative to the proposed amendments. In addition, broker-dealers would benefit from even greater relief from the Rule's provisions and from filing FINRA Form 211.

4. Quotations with Either Bid or Ask Prices for Piggyback Exception

The proposed amendments condition the piggyback exception on quotations with both bid and ask prices for the prior 30 calendar days with no gap in quoting of more than four days. One alternative would be to condition the exception on quotations with either a bid or ask price. Relative to the proposed amendments, this alternative would allow more securities to become eligible for the piggyback exception. As such, broker-dealers would incur less cost associated with the Rule's review, document collection, and record-keeping provisions (as well as filing FINRA Form 211) before publishing or submitting a quotation for an OTC security relative to the proposed amendments. The Commission has estimated that 879 OTC securities for which broker-dealers could publish quotations relying on the piggyback exception during 2018 did not have quotations with both bid and ask prices for four days one or more times in a year. Of these securities, 402 were of prospectus, Reg. A, and reporting issuers, 187 were of exempt foreign

private issuers, and 290 were of catch-all issuers. Therefore, the Commission estimates that the additional dollar benefit to broker-dealers from this relief would be $325,440.[290] OTC investors in higher quality issuers could benefit from greater liquidity if this reduced cost results in more securities remaining in the quoted market. However, this alternative may also allow less liquid securities to become eligible for piggybacked quotations relative to the proposed amendments. As a result, OTC investors may suffer costs if these securities are more prone to fraud than securities with more frequent quotations with both bid and ask prices. Therefore, the Commission preliminarily believes the proposed Rule is better than the alternative.

5. Alternative Disclosure Frequency

The Commission has sought to align the proposed Rule with existing regulatory requirements for publicly available information, as well as with private market solutions that have developed since the Commission last proposed to amend the Rule. Notwithstanding this, an alternative to the proposed amendments would be to define proposed paragraph (b) disclosures as "current" for catch-all issuers based on a different length of time (e.g., four months instead of six months) for the purposes of the initiation and resumption of quotes or reliance upon the piggyback exception. For example, increasing the frequency of disclosures required to qualify as "current" could benefit investors by improving the relevance of information used for investment decisions relative to the information available under the existing Rule. Investors could also benefit from decreased exposure to loss from fraud as heightened disclosure requirements could push trading activity in less transparent securities out of the OTC market or to the grey market. Higher quality OTC issuers could benefit from increased access to capital to the extent that

[290] (402 x $240) + (187 x $480) + (290 x $480) = $325,440.

heightened disclosure requirements lead to a net increase in demand for higher quality OTC stocks.

However, OTC issuers would face increased costs of providing disclosures more frequently under such an alternative. In particular, OTC issuers with no reporting obligations or minimal reporting obligations would effectively be subject to a more frequent reporting obligation under such an alternative. Some OTC issuers that wish to have quoted securities may find themselves effectively subject to a reporting framework that requires more frequent public disclosures than their current annual or semiannual reporting obligations as an issuer under the federal securities laws, such as reporting requirements under the Securities Act or exchange listing requirements under the Exchange Act. Broker-dealers, IDQSs, and national securities associations may also be required to review proposed paragraph (b) information more frequently under this alternative in order to initially publish or submit, or maintain, quotes in the OTC market. The Commission preliminarily believes the proposed Rule is better than the alternative because the additional benefits from more frequently disclosed information are likely to be minor, while the costs for issuers, broker-dealers, and other market participants could increase in proportion to the required frequency of disclosures.

Decreasing the frequency of required disclosures could have effects opposite to those discussed above. The Commission is not proposing such an alternative because a significant decrease in the frequency of required disclosures could make the disclosures less relevant for decision making purposes, driving down their potential benefit to investors.

E. Request for Comment

While the Commission welcomes any public input on its economic analysis, the Commission asks commenters to consider the following questions:

Q139. The Commission requests information including data that would help quantify the costs and the value of the benefits of the proposed amendments described above. The Commission seeks estimates of these costs and benefits, as well as any costs and benefits not already defined, that may result from the proposed amendments. The Commission also requests qualitative feedback on the nature of the benefits and costs described above and any benefits and costs the Commission may have overlooked.

Q140. In particular, the Commission requests information including data on the costs to issuers associated with preparing and providing publicly proposed paragraph (b) information, especially for issuers that do not currently have a reporting obligation under the Exchange Act or other federal securities laws or rules. To what extent are these costs mitigated by offering alternatives for releasing proposed paragraph (b) materials?

Q141. What types of investors typically invest in quoted OTC securities in terms of demographics such as age, income, wealth, education, gender and other characteristics such as financial literacy and behavior? What types of investors typically invest in OTC security promotions or pump-and-dump schemes? What are the typical outcomes from investment in quoted OTC securities, promotions, and pump-and-dump schemes for investors with different demographics and characteristics?

Q142. To what extent do investors consider already publicly available information about quoted OTC securities when making investment decisions? Would requiring all quoted OTC securities to have proposed paragraph (b) information publicly available increase investor reliance on issuer information (perhaps because it would become easier to compare among issuers)?

Q143. To what extent would the proposed amendments change the number of quoted securities? In particular, which types of quoted OTC securities will be likely to move away from the quoted OTC market to the grey market? Which types of OTC securities previously trading on the grey market are likely to move to the quoted market? Are there frictions to moving between the quoted OTC market and the grey market?

Q144. Which types of securities are likely to have significant discrepancies when comparing worldwide trading volume and trading volume reported to FINRA? Which data on trading will broker-dealers likely use when establishing eligibility for relying on the ADTV prong of the proposed ADTV and asset test exception?

Q145. What impact would the proposed amendments have on competition? Would the proposed amendments put issuers of quoted OTC securities, or particular types of issuers of quoted OTC securities, at a competitive advantage or disadvantage?

Q146. What impact would the proposed amendments have on efficiency? Has the Commission overlooked any positive or negative effects on efficiency?

Q147. What impact would the proposed amendments have on capital formation? Would there be any positive or negative effects on capital formation that the Commission may have overlooked?

Q148. To what degree would the costs of the proposed Rule's provisions be borne by a qualified IDQS on behalf of broker-dealers? To what degree would a qualified IDQS or registered national securities association make publicly available determinations that the requirements of an exception are met?

Q149. How common is it for broker-dealers to initiate quotations for OTC securities that were underwritten by them? To what extent would broker-dealers rely on the proposed exception for securities issued in offerings that were underwritten?

Q150. To what extent do certain broker-dealers have information systems in place to assess whether certain conditions (i.e., whether the issuer is a shell company within the proposed definition) apply to OTC issuers? Which types of broker-dealers, if any, have these information systems in place? What are the costs of setting up and maintaining such systems? Is it reasonable to assume that setting up such systems would involve a one-time fixed cost and negligible ongoing costs?

Q151. What is the degree of competition among broker-dealers that publish quotations for OTC securities? Is it the case that there is a handful of dominant broker-dealers publishing quotations for OTC securities or is this activity spread across many broker-dealers of varying size? Do certain broker-dealers publish quotations for a specific subset of OTC securities and not others (i.e., particular industries, domiciles, etc.)? How will the degree of competition change as a result of the proposed amendments? Has there been a change in the number of broker-dealers publishing quotations for OTS securities over time? Has there been a change in the number of broker-dealers conducting the information review under the Rule over time? Commenters are requested to provide data that would allow the Commission to identify broker-dealers publishing quotations for OTC securities as well as the potential costs of the proposed amendments on the broker-dealer industry.

Q152. For issuers of quoted OTC securities that do not currently have a reporting or disclosure obligation outside of the existing Rule, could requiring disclosures to be publicly available lead to changes in the nature or the quality of disclosures these companies provide?

For these same issuers, which method of distribution would they likely choose for making proposed paragraph (b) information publicly available?

Q153. To what extent are quoted OTC securities subjects of promotion campaigns? How is the propensity of a quoted OTC security to be the subject of a promotion campaign related to there being a lack of publicly available information about its issuer?

Q154. Are there alternatives the Commission should consider other than those discussed in this release? What are the costs and benefits of those alternatives relative to the regulatory baseline and relative to the proposed amendments?

IX. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")[291] requires federal agencies, in promulgating rules, to consider the impact of those rules on small businesses. Section 603(a)[292] of the Administrative Procedure Act,[293] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small businesses"[294] unless the Commission certifies that the rule, if adopted, would not have a significant impact on a substantial number of "small entities."[295]

As discussed above in PRA section above, the Commission believes that the Rule and proposed amendments impact the 89 broker-dealers that publish or submit quotations on OTC

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291 5 U.S.C. 601 et seq.

292 Id.

293 5 U.S.C. 551 et seq.

294 Although Section 601(b) of the RFA defines the term "small business," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term small business for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10 under the Exchange Act. Exchange Act Rule 0-10 ("Rule 0-10").

295 5 U.S.C. 605(b).

Markets Group's systems. A broker-dealer is a small entity if it has total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to §240.17a-5(d), and it is not affiliated with any person (other than a natural person) that is not a small business or small organization.[296] As of December 31, 2018, the Commission estimates that there were approximately 1,000 broker-dealers that would be small entities as defined above.

Based on a review of data involving the 89 broker-dealers that publish quotations for OTC securities, the Commission does not believe that any of the 89 broker-dealers impacted by the Rule are small entities under the above definition because they either exceed $500,000 in total capital or are affiliated with a person that is not a small entity as defined in Rule 0-10.[297] It is possible that in the future a small entity may become impacted by the Rule and the proposed amendments. Based on experience with broker-dealers that participate in this market, however, the Commission preliminarily believes that this scenario will be unlikely since firms that enter the market are likely to exceed $500,000 in total capital or be affiliated with a person that is not a small entity.

For the foregoing reason, the Commission certifies that the proposed amendments to Exchange Act Rule 15c2-11 would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission encourages written comments regarding this certification, and requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate the extent of the impact.

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296 Exchange Act Rule 0-10(c).

297 See supra Parts VII.B and VIII.B.

X. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission is also requesting information regarding the potential impact of the proposed amendments on the economy on an annual basis. In particular, comments should address whether the proposed changes, if adopted, would have a $100,000,000 annual effect on the economy, cause a major increase in costs or prices, or have a significant adverse effect on competition, investment, or innovations. Commenters should provide empirical data to support their views.

XI. Statutory Basis and Text of Proposed Rules

The rule amendments are being proposed pursuant to Sections 3, 10(b), 15(c), 15(h), 17(a), and 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78c, 78j(b), 78o(c), 78o(g), 78q(a), and 78w(a).

XII. List of Subjects

17 CFR Parts 230 and 240

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities

For the reasons set out in the preamble, the Commission is proposing to amend title 17, chapter II of the Code of the Federal Regulations as follows.

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The general authority for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78*ll*(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-

29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

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§ 230.144 [Amended]

2. Section 230.144, paragraph (c)(2), is amended by removing the text "(a)(5)(i) to (xiv), inclusive, and paragraph (a)(5)(xvi)" and adding in its place "(b)(5)(i)(A) to (N), inclusive, and paragraph (b)(5)(i)(P)".

PART 240-GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

4, Section 240.15c2-11 is revised to read as follows:

§ 240.15c2-11 Publication or submission of quotations without specific information.

(a) *Review Requirement.* As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices, it shall be unlawful for:

(1) A broker or dealer to publish any quotation for a security or, directly or indirectly, to submit any such quotation for publication, in any quotation medium, unless:

(i) Such broker or dealer has in its records the documents and information required by paragraph (b) of this section;

(ii) Such documents and information required by paragraph (b) of this section (excluding paragraphs (b)(5)(i)(N) through (P) of this section) are current and publicly available; and

(iii) Based upon a review of the documents and information required by paragraph (b) of this section, together with any other documents and information required by paragraph (c) of this section, such broker or dealer has a reasonable basis under the circumstances for believing that:

(A) The documents and information required by paragraph (b) of this section are accurate in all material respects; and

(B) The sources of the documents and information required by paragraph (b) of this section are reliable; or

(2) A qualified interdealer quotation system to make known to others the quotation of a broker or dealer that is published or submitted pursuant to paragraph (f)(7) of this section, unless:

(i) Such qualified interdealer quotation system has in its records documents and information required by paragraph (b) of this section (excluding paragraphs (b)(5)(i)(N) through (P) of this section except where the qualified interdealer quotation system has knowledge or possession of this information);

(ii) Such documents and information required by paragraph (b) of this section (excluding paragraphs (b)(5)(i)(N) through (P) of this section) are current and publicly available; and

(iii) Based upon a review of the documents and information required by paragraph (b) of this section (excluding paragraphs (b)(5)(i)(N) through (P) of this section except where the qualified interdealer quotation system has knowledge or possession of this information), together with any other documents and information required by paragraph (c) of this section, such qualified interdealer quotation system has a reasonable basis under the circumstances for believing that:

(A) The documents and information required by paragraph (b) of this section are accurate in all material respects; and

(B) The sources of the documents and information required by paragraph (b) of this section are reliable.

(b) *Required Information.* (1) A copy of the prospectus specified by section 10(a) of the Securities Act of 1933 for an issuer that has filed a registration statement under the Securities Act of 1933, other than a registration statement on Form F-6, that became effective less than 90 calendar days prior to the day on which such broker or dealer publishes or submits the quotation to the quotation medium; *Provided,* That such registration statement has not thereafter been the subject of a stop order that is still in effect when the quotation is published or submitted; or

(2) A copy of the offering circular provided for under Regulation A under the Securities Act of 1933 for an issuer that has filed a notification under Regulation A and was authorized to commence the offering less than 40 calendar days prior to the day on which such broker or dealer publishes or submits the quotation to the quotation medium; *Provided,* That the offering circular provided for under Regulation A has not thereafter

become the subject of a suspension order that is still in effect when the quotation is published or submitted; or

(3) A copy of the:

(i) Issuer's most recent annual report filed pursuant to section 13 or 15(d) of the Act, together with any periodic and current reports that have been filed thereafter under the Act by the issuer, except for current reports filed during the three business days prior to the publication or submission of the quotation; *Provided*, *however*, That

(A) Until such issuer has filed its first such annual report, the broker, dealer, or qualified interdealer quotation system has in its records a copy of the registration statement filed by the issuer under the Securities Act of 1933, other than a registration statement on Form F-6, that became effective within the prior 16 months, or a copy of any registration statement filed by the issuer under section 12 of the Act that became effective within the prior 16 months, together with any periodic and current reports filed thereafter under section 13 or 15(d) of the Act, and

(B) The broker, dealer, or qualified interdealer quotation system has a reasonable basis under the circumstances for believing that the issuer is current in filing such reports described in this paragraph (b)(3)(i);

(ii) Issuer's most recent annual report filed pursuant to Regulation A (§§ 230.251 through 230.263 of this chapter), together with any periodic and current reports filed thereafter under Regulation A by the issuer, except for current reports filed

during the three business days prior to the publication or submission of the quotation; *Provided*, *however*, That

(A) Until such issuer has filed its first such annual report, the broker, dealer, or qualified interdealer quotation system has in its records a copy of the offering circular filed by the issuer under Regulation A, that was qualified within the prior 16 months, together with any periodic and current reports filed thereafter under Regulation A, and

(B) The broker, dealer, or qualified interdealer quotation system has a reasonable basis under the circumstances for believing that the issuer is current in filing such reports described in this paragraph (b)(3)(ii);

(iii) Annual statement referred to in section 12(g)(2)(G)(i) of the Act (in the case of an issuer required to file reports pursuant to section 13 or 15(d) of the Act), together with any periodic and current reports filed thereafter under the Act by the issuer, except for current reports filed during the three business days prior to the publication or submission of the quotation; *Provided*, *however*, That

(A) Until such issuer has filed its first such annual statement, the broker, dealer, or qualified interdealer quotation system has in its records a copy of the registration statement filed by the issuer under the Securities Act of 1933, other than a registration statement on Form F-6, that became effective within the prior 16 months, or a copy of any registration statement filed by the issuer under section 12 of the Act, that became effective within the prior 16 months, together with any periodic and current reports filed thereafter under section 13 or 15(d) of the Act, and

(B) The broker, dealer or qualified interdealer quotation system has a reasonable basis under the circumstances for believing that the issuer is current in filing such reports described in this paragraph (b)(3)(iii); or

(iv) Annual statement referred to in section 12(g)(2)(G)(i) of the Act (in the case of an issuer of a security that falls within the provisions of section 12(g)(2)(G) of the Act); *Provided*, *however*, That the broker, dealer, or qualified interdealer quotation system has a reasonable basis under the circumstances for believing that the issuer is current in filing (in the case of an insurance company exempted from section 12(g) of the Act by reason of section 12(g)(2)(G) thereof) the annual statement referred to in section 12(g)(2)(G)(i) of the Act; or

(4) A copy of the information that, since the beginning of its last fiscal year, the issuer has published pursuant to § 240.12g3-2(b), which the broker or dealer must make available upon the request of a person expressing an interest in a proposed transaction in the issuer's security with the broker or dealer, such as by providing the requesting person with appropriate instructions regarding how to obtain the information electronically; or

(5)(i) The following information, which must be made publicly available (excluding paragraphs (b)(5)(i)(N) through (P) of this section) and be current as of a date within 12 months prior to the publication or submission of the quotation, unless otherwise specified:

(A) The name of the issuer and its predecessor (if any);

(B) The address of the issuer's principal executive offices;

(C) The state of incorporation or registration;

(D) The title and class of the security;

(E) The par or stated value of the security;

(F) The number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year;

(G) The name and address of the transfer agent;

(H) A description of the issuer's business;

(I) A description of products or services offered by the issuer;

(J) A description and extent of the issuer's facilities;

(K) The name of the chief executive officer, members of the board of directors, and officers, as well as any person who is, directly or indirectly, the beneficial owner of more than 10 percent of the outstanding units or shares of any class of any equity security of the issuer;

(L) The issuer's most recent balance sheet (as of a date less than 16 months before the publication or submission of the quotation) and profit and loss and retained earnings statements (for the 12 months preceding the date of the most recent balance sheet); *Provided, however*, That if the balance sheet is not as of a date less than six months before the publication or submission of the quotation, the balance sheet must be accompanied with profit and loss and retained earnings statements for the period from the date of such balance sheet to a date that is less than six months before the publication or submission of the quotation;

(M) Similar financial information for such part of the two preceding fiscal years as the issuer or its predecessor has been in existence;

(N) Whether the broker or dealer or any associated person of the broker or dealer is affiliated, directly or indirectly, with the issuer;

(O) Whether the quotation is being published or submitted on behalf of any other broker or dealer and, if so, the name of such broker or dealer; and

(P) Whether the quotation is being submitted or published, directly or indirectly, by or on behalf of the issuer or persons identified in paragraph (b)(5)(i)(K) of this section and, if so, the name of such person and the basis for any exemption under the federal securities laws for any sales of such securities on behalf of such person.

(ii) The broker or dealer must make information required by paragraph (b)(5)(i) of this section available upon the request of a person expressing an interest in a proposed transaction in the issuer's security with the broker or dealer, such as by providing the requesting person with appropriate instructions regarding how to obtain publicly available information electronically. If such information is made available to others upon request pursuant to this paragraph, such delivery, unless otherwise represented, shall not constitute a representation by such broker or dealer that such information is accurate, but shall constitute a representation by such broker or dealer that the information is current in relation to the day the quotation is submitted, that the broker or dealer has a reasonable basis under the circumstances for believing the information is accurate in all material respects, and that the information was obtained from sources that the broker or dealer has a reasonable basis for believing are reliable. Paragraph (b)(5)of this section shall

apply to any security of an issuer that is not included in paragraphs (b)(1) through (b)(4) of this section. Paragraph (b)(5) of this section shall apply to any security of an issuer if information described in paragraphs (b)(1) through (b)(4) of this section is not current.

(c) *Supplemental Information.* With respect to any security the quotation of which is within the provisions of this section, the broker or dealer submitting or publishing such quotation, or any qualified interdealer quotation system that makes known to others the quotation of a broker or dealer pursuant to paragraph (a)(2) of this section, shall have in its records the following documents and information:

(1) Records related to the submission or publication of such quotation, including the identity of the person or persons for whom the quotation is being published or submitted, whether such person or persons is the issuer, chief executive officer, any members of the board of directors, officers, or any person, directly or indirectly, the beneficial owner of more than 10 percent of the outstanding units or shares of any class of equity security of the issuer, and any information regarding the transactions provided to the broker, dealer or qualified interdealer quotation system by such person or persons;

(2) A copy of any trading suspension order issued by the Commission pursuant to section 12(k) of the Act concerning any securities of the issuer or its predecessor (if any) during the 12 months preceding the date of the publication or submission of the quotation or a copy of the public release issued by the Commission announcing such trading suspension order; and

(3) A copy or a written record of any other material information (including adverse information) regarding the issuer that comes to the knowledge or possession of the

broker, dealer, or qualified interdealer quotation system before the publication or submission of the quotation.

(d) *Recordkeeping.* (1)(i) The following persons shall preserve for a period of not less than three years, the first two years in an easily accessible place, the documents and information required under paragraphs (a), (b), and (c) of this section:

(A) Any broker or dealer publishing or submitting a quotation pursuant to paragraph (a)(1) of this section concerning a security; or

(B) Any qualified interdealer quotation system that makes known to others the quotation of a broker or dealer pursuant to paragraph (a)(2) of this section concerning a security;

(ii) *Provided, however*, That documents and information required by paragraph (b) of this section are not required to be preserved if it is available on the Commission's *Electronic Data Gathering, Analysis and Retrieval System* ("*EDGAR*") and the broker-dealer or qualified interdealer quotation system documents the documents and information required by paragraph (b) of this section that it reviewed.

(2)(i) The following persons shall preserve for a period of not less than three years, the first two years in an easily accessible place, the documents and information that demonstrate that the requirements for an exception under paragraphs (f)(2), (f)(3), (f)(5), (f)(6), (f)(7), and (f)(8) of this section are met:

(A) Any qualified interdealer quotation system or registered national securities association that makes the publicly available determinations described in paragraph (f)(8) of this section; and

(B) Any broker or dealer publishing or submitting a quotation pursuant to paragraph (f) of this section; *Provided, however*, That any broker or dealer that relies on a determination described in paragraphs (f)(7) or (f)(8) of this section is required to preserve only a record of the exception upon which the broker or dealer is relying and the name of the qualified interdealer quotation system or registered national securities association that determined that the requirements of that exception are met.

(ii) *Provided, further,* That paragraph (b) information is not required to be preserved if it is available on the Commission's *Electronic Data Gathering, Analysis and Retrieval System* ("*EDGAR*").

(e) *Definitions.* For purposes of this section:

(1) *Current* shall mean filed, published, or disclosed in accordance with the time frames identified in each paragraphs (b)(1) through (b)(5) of this section.

(2) *Interdealer quotation system* shall mean any system of general circulation to brokers or dealers that regularly disseminates quotations of identified brokers or dealers.

(3) *Issuer*, in the case of quotations for American Depositary Receipts, shall mean the issuer of the deposited shares represented by such American Depositary Receipts.

(4) *Publicly available* shall mean available on the Commission's *Electronic Data Gathering, Analysis and Retrieval System* ("*EDGAR*") or on the website of a qualified interdealer quotation system, a registered national securities association, the issuer, or a registered broker or dealer; *Provided, however*, That *publicly available* shall not mean where access to documents and information required by paragraph (b) of this section is restricted by user name, password, fees, or other restraints.

(5) *Qualified interdealer quotation system* shall mean any interdealer quotation system that meets the definition of an "alternative trading system" under Rule 300(a) of Regulation ATS and operates pursuant to the exemption from the definition of an "exchange" under Rule 3a1-1(a)(2) of the Act.

(6) Except as otherwise specified in this rule, *quotation* shall mean any bid or offer at a specified price with respect to a security, or any indication of interest by a broker or dealer in receiving bids or offers from others for a security, or any indication by a broker or dealer that wishes to advertise its general interest in buying or selling a particular security.

(7) *Quotation medium* shall mean any "interdealer quotation system" or any publication or electronic communications network or other device that is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell.

(8) *Shell company* shall mean any issuer, other than a business combination related shell company, as defined in § 230.405 of this chapter, or an asset-backed issuer as defined in Item 1101(b) of Regulation AB (§ 229.1101(b) of this chapter), that has:

(i) No or nominal operations; and

(ii) Either:

(A) No or nominal assets;

(B) Assets consisting solely of cash and cash equivalents; or

(C) Assets consisting of any amount of cash and cash equivalents and nominal other assets.

(f) *Exceptions*. Except as provided in paragraph (d)(2) of this section, the provisions of this section shall not apply to:

(1) The publication or submission of a quotation concerning a security that is admitted to trading on a national securities exchange and that is traded on such an exchange on the same day as, or on the business day next preceding, the day the quotation is published or submitted

(2) The publication or submission by a broker or dealer, solely on behalf of a customer (other than a person acting as or for a dealer), of a quotation that represents the customer's unsolicited indication of interest; *Provided*, *however*, That this paragraph (f)(2) shall not apply to a quotation:

(i) Consisting of both a bid and an offer, each of which is at a specified price, unless the quotation medium specifically identifies the quotation as representing such an unsolicited customer interest; or

(ii) Published or submitted, directly or indirectly, by or on behalf of the chief executive officer, members of the board of directors, officers, or any person who is, directly or indirectly, the beneficial owner of more than 10 percent of the outstanding units or shares of any class of any equity security of the issuer, unless documents and information required by paragraph (b) of this section are current and publicly available.

(3)(i)(A) The publication or submission, in an interdealer quotation system that specifically identifies as such unsolicited customer indications of interest of the kind described in paragraph (f)(2) of this section, of a quotation concerning a security that has been the subject of both bid and ask quotations (exclusive of any identified customer

interests) in such a system at specified prices within the previous 30 calendar days, with no more than four business days in succession without such a quotation;

(B) The publication or submission, in an interdealer quotation system that does not so identify any such unsolicited customer indications of interest, of a quotation concerning a security that has been the subject of both bid and ask quotations in an interdealer quotation system at specified prices within the previous 30 calendar days, with no more than four business days in succession without such a quotation; or

(C) A dealer acting in the capacity of market maker, as defined in section 3(a)(38) of the Act, that has published or submitted a quotation concerning a security in an interdealer quotation system and such quotation has qualified for an exception provided in this paragraph (f)(3), may continue to publish or submit quotations for such security in the interdealer quotation system without compliance with this section, unless and until such dealer ceases to submit or publish a quotation or ceases to act in the capacity of market maker concerning such security;

(ii) *Provided, however,* That this paragraph (f)(3) shall not apply to the security of an issuer that is a shell company or that was the subject of a trading suspension order issued by the Commission pursuant to section 12(k) of the Act until 60 calendar days after the expiration of such order; and that this paragraph (f)(3) shall apply to a publication or submission of a quotation concerning a security of an issuer included in paragraph (b)(5) of this section only where the information required by paragraph (b)(5)(i) (excluding paragraphs (b)(5)(i)(N) through (P)) is

current and has been made publicly available within six months before the date of publication or submission of such quotation.

(4) The publication or submission of a quotation concerning a municipal security.

(5)(i) The publication or submission of a quotation concerning:

(A) A security with a worldwide average daily trading volume value of at least $100,000 during the 60 calendar days immediately before the publication of the quotation of such security; and

(B) The issuer of such security has at least $50 million in total assets and $10 million in unaffiliated shareholders' equity as reflected in the issuer's publicly available audited balance sheet issued within six months after the end of its most recent fiscal year;

(ii) *Provided, however*, That this paragraph (f)(5) shall apply only to the publication or submission of a quotation concerning such security if documents and information required by paragraph (b) of this section of the issuer of such security are current and publicly available.

(6) The publication or submission of a quotation concerning a security by a broker or dealer that is named as an underwriter in a registration statement for an offering of that class of security referenced in paragraph (b)(1) of this section or in an offering circular for an offering of that class of security referenced in paragraph (b)(2) of this section; *Provided, however*, That this paragraph (f)(6) shall apply only to the publication or submission of a quotation concerning such security within the time frames identified in paragraphs (b)(1) or (b)(2) of this section.

(7) The publication or submission of a quotation by a broker or dealer, in a qualified interdealer quotation system, concerning a security where such qualified interdealer quotation system complies with the requirements of paragraphs (a) through (c) of this section and also makes a publicly available determination of such compliance, and a broker or dealer publishes or submits a quotation in reliance on this exception within three business days after such publicly available determination; *Provided, however*, That this paragraph (f)(7) shall not apply to a quotation concerning a security:

(i) If the issuer of such security is a shell company; or

(ii) After the first 30 calendar days of publication or submission of such quotation by a broker or dealer in reliance on this paragraph (f)(7).

(8) The publication or submission of a quotation by a broker or dealer that relies on publicly available determinations by a qualified interdealer quotation system or registered national securities association that:

(i) Documents and information required by paragraph (b) are current and publicly available;

(ii) A broker or dealer may rely on an exception contained in paragraph (f)(1), (f)(3)(i)(A), (f)(3)(i)(B), (f)(4), (f)(5), or (f)(7) of this section;

(iii) The qualified interdealer quotation system or registered national securities association has reasonably designed written policies and procedures to determine whether documents and information required by paragraph (b) of this section are current and publicly available and that the requirements of an exception under paragraph (f) of this section are met.

(g) *Exemptive Authority.* Upon written application or upon its own motion, the Commission may, conditionally or unconditionally, exempt by order any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

By the Commission.

Vanessa Countryman

Secretary

Dated: September 25, 2019